84- 990

NO. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

TOLEDO, PEORIA & WESTERN RAILROAD COMPANY
a Corporation, PETITIONER

v.

STATE OF ILLINOIS, DEPARTMENT OF TRANSPORTATION; JOHN D. KRAMER; J. E. HARLAND; and ALLEN AUSTIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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December 1984

37pp

QUESTIONS PRESENTED

I. Whether the existence of a state court of claims defeats federal jurisdiction over Fifth and Fourteenth Amendment property claims, regardless of whether the court of claims has power to fashion an appropriate remedy.

II. Whether a state agency is a "person" within the meaning of 42 U.S.C. § 1983.

III. Whether a plaintiff who prevails on the constitutional merits of a § 1983 civil rights suit is entitled to reasonable attorney's fees.

PARTIES

All of the parties in the United States Court of Appeals for the Seventh Circuit are listed in the caption.

CORPORATE PARTY'S AFFILIATION

On January 1, 1984, Toledo, Peoria & Western Railroad Company merged into Atchison, Topeka & Santa Fe Railway Company, a corporation. Atchison, Topeka & Santa Fe Railway Company is wholly owned by Santa Fe Industries, a corporation, which in turn is wholly owned by Santa Fe South Pacific Corporation.

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

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a Corporation, PETITIONER

v.

STATE OF ILLINOIS, DEPARTMENT OF
TRANSPORTATION; JOHN D. KRAMER; J. E.
HARLAND; and ALLEN AUSTIN

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

The Petitioner Toledo, Peoria & Western Railroad Company respectfully seeks a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on September 26, 1984.

OPINIONS BELOW

The opinion of the court of appeals

is reported at 744 F.2d 1296 (7th Cir. 1984) and appears infra at App. A-1.

The district court rendered four opinions in this case. Its Decision and Order of September 14, 1981, is unreported and appears infra at App. A-7. The Decision and Order of September 16, 1982, is reported at 547 F. Supp. 140 (C.D. Ill. 1982) and appears infra at App. A-22. The Decision and Order of June 1, 1983, is unreported and appears infra at App. A-36. The Decision and Order of August 11, 1983, is unreported and appears infra at App. A-48.

JURISDICTION

The court of appeals entered judgment on September 26, 1984. This Petition for a writ of certiorari was filed within ninety days of that date, as required by 28 U.S.C. § 2101. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> . . . [N]or shall private property be taken for public use without just compensation.

2. The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not extend to any suit in law or equity, commenced or prosecuted against any of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

3. The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property without due process of law.

4. The Civil Rights Act of 1871, 42 U.S.C. § 1871 et seq., provides in relevant part:

> Every person who, under color of any Statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . . 42 U.S.C. § 1983.
>
> . . .In any action to enforce sections 1981, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion may allow the prevailing party . . . a reasonable attorney's fee as part of the costs. 42 U.S.C. § 1988.

5. Article XIII, Section 4, of the Illinois Constitution provides:

> Except as the General Assembly may provide by law, sovereign immunity in this State is abolished.

6. "An Act in relation to immunity for the State of Illinois," Ill. Rev. Stat. ch. 127, par. 801, provides in relevant part:

> Except as provided in "An Act to create the court of claims . . . . ," the State of Illinois shall not be made a defendant or party in any court. Ill. Rev. Stat. ch. 127, par. 801 (1981).

7. Section 8 of "An Act to create the [Illinois] Court of Claims . . . ," Ill. Rev. Stat. ch. 37, par. 439.1 et. seq., provides in relevant part:

> The court shall have exclusive jurisdiction to hear and determine the following matters:
>
> (a) All claims against the state founded upon any law of the State of Illinois . . . .
>
> . . . .
>
> (d) All claims against the State for damages sounding in tort, . . . provided, that an award for damages in a case sounding in tort . . . shall not exceed the sum of $100,000 to or for the benefit of any claimant. . . . Ill. Rev. Stat. ch. 37, par 439.8(a), (d) (1981).

STATEMENT

In 1956, Petitioner Railroad conveyed to the State of Illinois an easement for highway purposes over real estate known as Lot J, East Peoria, Illinois. Approximately .25 acre of this 3.00 acre tract was used for highway right of way. Since 1956, the State has made no use of the remaining 2.75 acres for any public purpose. At all times under consideration, the Railroad owned the fee interest in Lot J.

In 1977, the State leased part of Lot J to an adjoining motel owner for use as a commercial parking lot. After the railroad discovered that its property was being leased as a parking lot, it requested a meeting with representatives of the Illinois Department of Transportation (IDOT). A meeting was held in January of 1980, at which time state officials verbally agreed to formally

vacate Lot J (except for the .25 acre referred to above and access to a bridge abutment). Thereafter, the state officials prepared a vacation plat for 2.708 acres and informed the Petitioner that the appraised value of the land was $206,400. Rather than pay for the fee interest that it already owned, Petitioner chose to litigate.

Petitioner brought this action under 42 U.S.C. § 1983 against IDOT and three of its officials. The complaint stated that respondents, acting under color of state law, had taken Petitioner's fee interest in real property without just compensation and without due process of law in violation of the Fifth and Fourteenth Amendments. Specifically, the complaint alleged that the State had no right to lease Lot J for commercial use since it did not own it.

Before trial, the district court resolved the legal issues. The Court denied respondents' motion for dismissal (Decision & Order of Sept. 4, 1981, App. at A-7 to A-21), denied respondents' motion for summary judgment (Decision & Order of Sept. 16, 1982, App. at A-22 to A-35), and denied respondents' motion for judgment on the pleadings (Decision & Order of June 8, 1983, App. at A-36 to A-47). Respondents had based these motions on three legal grounds: 1) that Petitioner's claim is barred by state sovereign immunity as afforded by the Eleventh Amendment, 2) that the Illinois Court of Claims provides an adequate remedy at law for Petitioner, and 3) that Petitioner actually had conveyed a fee simple interest in Lot J rather than an easement for highway purposes.

In denying these motions, the district court held that the Eleventh

Amendment precluded recovery of money damages but did not bar the requested injunctive relief. The court ruled that the easement document conveyed only an easement for highway purposes, not the fee interest that the State claimed. Finally, the court ruled that the remedy available to the Petitioner in the Illinois Court of Claims was inadequate.

The case proceeded to bench trial on the factual question of whether the State had abandoned the easement. The court found an abandonment and ordered that a mandatory injunction issue directing respondents to take the necessary steps to acknowledge that the possessory rights granted in the easement had been extinguished. Although Petitioner prevailed on the merits, the district court declined to award attorney's fees to Petitioner under 42 U.S.C. § 1988.

(Decision & Order of Aug. 11, 1983, App. at A-48 to A-64).

Respondents appealed on the merits to the United States Court of Appeals for the Seventh Circuit, and Petitioner cross-appealed with respect to the denial of attorney's fees. The Seventh Circuit reversed on the ground that federal courts lack jurisdiction over Petitioner's suit. The court stated that IDOT, a state agency, is not a "person" within the meaning of § 1983. The Eleventh Amendment, the court continued, bars the claim against the remaining respondents--the state officials--because the requested relief would directly affect the State of Illinois. Because it ruled against Petitioner on the merits, the Seventh Circuit dismissed Petitioner's cross-appeal regarding attorney's fees. (Opinion of September 26, 1984, App. at A-1 to A-6).

REASONS FOR GRANTING THE PETITION

It is not simple to discern the circumstances that must exist before a federal court may address a state's illegal taking of property. Confusion in this area has enabled the State of Illinois to confiscate Petitioner's land. This case presents the Court with an opportunity to explore and clarify the principles governing a significant federal question--whether the Eleventh Amendment truly denies a federal remedy to a party whose real property has been unconstitutionally taken by a state.

Here, the Seventh Circuit's opinion illustrates the aspects of Eleventh Amendment doctrine which lend themselves to misconstruction. In hastily ridding itself of what it called "a suit to quiet title," App. at A-5, the court of appeals gave short shrift to the issue of state

sovereign immunity and to Petitioner's property rights.

I. This Case Presents An Opportunity For Deciding Whether The Mere Existence Of A State Court of Claims Defeats Federal Jurisdiction Over Fifth And Fourteenth Amendment Property Claims, Regardless Of Whether The Court Of Claims Remedy Is Appropriate

The principles of state sovereign immunity limit federal jurisdiction over a citizen's claim that a state has acquired property in violation of the federal constitution. In Parratt v. Taylor, 451 U.S. 527, 543-44 (1981), this Court held that the availability of an adequate state law remedy defeats a citizen's Fourteenth Amendment claim that a state acquired property without due process. In Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 697 n.18, 703 n.27 (1949), which concerned a

contract dispute but involved no constitutional claims, this Court indicated in footnote dicta that a court of claims breach of contract remedy would defeat a Fifth Amendment claim that a sovereign has taken property without just compensation. While Parratt provides little guidance in cases where a court of claims exists but affords no appropriate remedy, the Larson dicta simply is without the force of law. Yet, without further clarification, these cases can operate to deny a federal remedy to a citizen whose property a state has taken in violation of federal rights. Petitioner's case provides the appropriate vehicle for insuring that a state cannot simply assert the existence of its court of claims--without reference to whether that court provides an appropriate remedy--to defeat federal jurisdiction over a citizen's Fifth and Fourteenth Amendment

claims.

Petitioner does not dispute that Eleventh Amendment principles of state sovereign immunity ordinarily bar federal jurisdiction over a suit against an unconsenting state by one of its citizens. See Hans v. Louisiana, 134 U.S. 1 (1890). In Ex parte Young, 209 U.S. 123 (1908), however, this Court established an exception to the general rule for cases in which the citizen claims a violation of his federal constitutional rights. Because Eleventh Amendment principles must be harmonized with the supremacy of rights secured elsewhere in the Constitution, see Pennhurst State School & Hospital v. Halderman, 104 S. Ct. 910-11 (1984), a federal court cannot refuse jurisdiction over a constitutional suit for prospective, injunctive relief against state officials. Edelman v.

Jordan, 415 U.S. 651 (1974).

Petitioner's suit falls squarely within the Ex parte Young exception, as does the prospective, injunctive relief against state officials that Petitioner seeks. The district court below determined that Petitioner granted an easement in real property to the State, which easement the State subsequently abandoned. Title to the fee interest therefore rests in Petitioner, but state officials refuse to vacate the easement unless Petitioner pays the appraised value of the fee interest. Under these circumstances, the officials' conduct deprives Petitioner of property without just compensation in violation of the Fifth Amendment, as applied to the states by the Fourteenth Amendment, Chicago B. & Q. R. Co., 166 U.S. 226 (1897). In addition, the deprivation is without the due

process guaranteed to Petitioner by the Fourteenth Amendment.

Where a citizen claims a taking in violation of the Fifth Amendment, principles of sovereign immunity do not prevent a court's initial inquiry concerning the validity of the plaintiff's claim to title. This determination enables the court to decide whether sovereign immunity bars the claim. If title actually is in the sovereign, the suit is barred as one against the sovereign. On the other hand, if title is in the plaintiff, the suit may proceed to vindicate an unconstitutional taking of property. Florida Department of State v. Treasure Salvors, Inc., 102 S. Ct. 3304, 3330 n.13 (1982) (White, J., concurring in the judgment in part, dissenting in part; joined by Powell, Rehnquist, and O'Connor, JJ.); Larson v. Domestic & Foreign Commerce Corp., 337

U.S. at 696-97; United States v. Lee, 106 U.S. 196 (1882).

According to these principles, the district court properly determined title to the property at issue here. Having concluded that Petitioner owned the entire fee, the court correctly assumed jurisdiction over this suit against state officials for prospective, injunctive relief.

The Seventh Circuit cited only Larson, 337 U.S. 682, and Seifert v. Standard Paving Co., 64 Ill. 2d 109, 355 N.E.2d 537 (1976), in holding that Petitioner's Fifth and Fourteenth Amendment claims are satisfied by the availability of a remedy in the Illinois Court of Claims. Curiously, neither case involved a Fifth Amendment claim. Only Seifert addressed a claimed Fourteenth Amendment due process violation. In Seifert, the Illinois Supreme Court rejected the

notion that Court of Claims proceedings must resemble those of a trial court in order to meet Fourteenth Amendment due process requirements. 64 Ill. 2d at 121, 355 N.E.2d at 541-42. Neither case cited by the court of appeals provides an adequate basis for denying a federal remedy to Petitioner. The Seventh Circuit's clumsy, cursory treatment of this issue illustrates the need for this Court's guidance on this point. Petitioner's case affords an opportunity to replace the Larson dicta with a thorough discussion of whether a state law remedy should defeat a claim based on the Fifth Amendment. As the following discussion will illustrate, this case also is an appropriate vehicle for setting standards that a state remedy must meet before a citizen may be denied a federal remedy for a federal claim.

The Illinois Court of Claims is actually an administrative tribunal which holds exclusive jurisdiction over claims against the State based on Illinois law. Ill. Const., art. XIII, § 4; Ill. Rev. Stat. ch. 127, par. 801 (1981); id. ch. 37, par. 439.8. As a state lawsuit, Petitioner's cause of action would take the form of either a tortious holding of property or an equitable suit to quiet title. In a tort action, the Court of Claims cannot award damages exceeding $100,000. Id. ch. 37, par. 439.8(d). In suits for equitable relief, it is unclear whether the Court of Claims has jurisdiction. Sass v. Kramer, 72 Ill. 2d 485, 381 N.E.2d 975 (1978).

A majority of the Illinois Supreme Court holds that the exclusive jurisdiction of the Court of Claims renders other Illinois courts powerless to hear any claim against the State, even where the

claim is of an equitable nature. See Ellis v. Board of Governors of State Colleges & Universities, 102 Ill. 2d 387, 466 N.E.2d 202 (1984); Sass v. Kramer, 72 Ill. 2d 485, 381 N.E.2d 975 (1978). These opinions do not address the question whether the Court of Claims has power to fashion an equitable remedy; the cases stand only for the principle that the Illinois judicial branch has no jurisdiction over any claim against the State. However, two dissenting Illinois Supreme Court justices have confronted the question concerning equitable jurisdiction in the Court of Claims. Both indicate plainly that the Court of Claims has no power to fashion an equitable award. Ellis, 102 Ill. 2d at 397, 466 N.E.2d at 207 (Simon, J., dissenting) ("Court of Claims only has authority to recommend that the legislature make an appropriation for damages"); Sass, 72

Ill. 2d at 493, 381 N.E.2d at 978 (Moran, J., dissenting) ("It is no answer to argue that . . . [plaintiff] has an adequate remedy in the Illinois Court of Claims, for that entity does not have equitable jurisdiction.")

In this case, where the State itself values Petitioner's property at $206,400, the Court of Claims remedies are wholly inadequate. The $100,000 ceiling on tort recovery would prevent adequate compensation in a tort action. With regard to an equitable suit to quiet title, even if the Court of Claims purported to resolve the dispute, the controversy surrounding that court's equitable powers would operate to cloud any title that might be declared in Petitioner's case.

Despite these deficiencies, the Seventh Circuit concluded that the existence of a state law forum defeats Petitioner's Fifth and Fourteenth Amendment

claims. Petitioner respectfully asks this Court to review the Seventh Circuit's resolution of this issue.

II. The Seventh Circuit Erroneously Held That A State Agency Is Not A Person Within The Meaning Of § 1983.

According to the court of appeals, Petitioner's suit against IDOT failed for lack of federal court jurisdiction because state agencies are not "persons" under 42 U.S.C. § 1983. This theory, which necessarily relies on the view that states themselves are not § 1983 persons, goes farther than this case requires. If the Eleventh Amendment indeed bars a suit against IDOT, the Seventh Circuit need only have dismissed IDOT from the action and proceeded to resolve the issues relating to the remaining defendants. See Florida Department of State v. Treasure Salvors, Inc., 102 S. Ct. 3304,

3314 n.20 (1982); Alabama v. Pugh, 438 U.S. 781, 782 (1981). By holding instead that a state agency is not a § 1983 person, the Seventh Circuit reached a result that conflicts with prior decisions of this Court.

To decide as it did, the Seventh Circuit confused Eleventh Amendment principles with the question of Congressional intent regarding the identity of permissible parties defendant in a § 1983 cause of action. The Seventh Circuit refused to acknowledge that the Eleventh Amendment does not always defeat federal jurisdiction in cases where a state is a party in interest. Congress may abrogate a state's Eleventh Amendment immunity when necessary to enforce Fourteenth Amendment protections. See Fitzpatrick v. Bitker, 427 U.S. 445 (1976). Also, when state policy is unconstitutional or in violation of a federal statute, a

federal court may award prospective injunctive relief against a state official, even where the relief will have an ancillary effect on the state treasury. See Edelman v. Jordan, 415 U.S. 651, 668 (1974); Ex parte Young, 209 U.S. 123 (1908).

These Eleventh Amendment principles affect federal court jurisdiction in a vastly different way than does the Seventh Circuit's conclusion that a state and its agencies are not persons within the meaning of § 1983. Under the non-person view, no § 1983 cause of action even exists to challenge state conduct. This result cannot co-exist with this Court's leading decisions in this area. Although sovereign immunity principles ordinarily limit § 1983 suits to actions for prospective, injunctive relief against state officials, this Court does not pretend that such relief runs against

the officials and not against the state. See Pennhurst State School & Hospital v. Halderman, 104 S. Ct. 900, 915 n.25. Even as it rejected the claim that Congress abrogated state sovereign immunity when it enacted § 1983, this Court declined to "render § 1983 meaningless insofar as states are concerned." Quern v. Jordan, 440 U.S. 332, 345 (1979).

This Court has applied the Ex parte Young exception to state sovereign immunity in recognizing § 1983 causes of action against state officials where state policy violated Constitutional rights or federal statutes. While the remedy in such cases is limited to prospective, injunctive relief against a state official, this Court based that limitation on Eleventh Amendment principles, not on the notion that Congress intended that no § 1983 action may be brought against a state. This Court has

granted full prospective relief in § 1983 actions challenging state policies, despite the fiction that state officials, instead of the state or its agencies, were the parties defendant. E.g., Alabama v. Pugh, 438 U.S. 781 (1981) (State Department of Corrections required to conform prison conditions to federal constitutional requirements); Edelman v. Jordan, 415 U.S. 651 (1974) (State Department of Public Aid required to conform its processing of Public Aid applications to federal requirements). The Seventh Circuit's holding that IDOT is not a person under § 1983 cannot stand in view of these decisions by this Court.

To reach its result concerning IDOT, the court of appeals relied on cases that no longer are valid. E.g., Edelberg v. Illinois Racing Board, 540 F.2d 279, 281 n.2 (7th Cir. 1976); United States ex rel. Gittlemacker v. County of

Philadelphia, 413 F.2d 84, 86 & n.2 (3d Cir. 1969). After Monroe v. Pape, 365 U.S. 167 (1961), which held that municipalities were not persons within the meaning of § 1983, several lower federal courts extended the Monroe holding to states and their agencies. Later, Monell v. Department of Social Services, 436 U.S. 658 (1978), reversed Monroe and held that municipalities could be named as defendants under § 1983.

Instead of recognizing that the issue concerning a state's § 1983 status cried out for thorough review, the Seventh Circuit simply relied on the old lower court cases based on Monroe. The court of appeals considered that these overruled cases were revived by Quern v. Jordan, 440 U.S. 332 (1979), a case decided after Monell which held that Congress did not abrogate state sovereign immunity when it enacted § 1983. The

Seventh Circuit's misguided reasoning on this point confuses the constitutional immunity issue with the statutory "person" issue and treats the two questions as one.

Instead of an erroneous ruling with regard to a state agency's status as a § 1983 person, the proper development of Eleventh Amendment principles calls for a probing inquiry into the question whether, in the proper case, this Court should cut through the long-standing Ex parte Young fiction and recognize a state agency as a party defendant in a § 1983 suit. Petitioner asserts that this is the proper case, and therefore respectfully requests this Court to grant its petition for a writ of certiorari.

III. The Seventh Circuit Erroneously Dismissed Petitioner's Cross Appeal Requesting Reasonable Attorney's Fees.

Ordinarily, the prevailing plaintiff in a § 1983 suit should recover reasonable attorney's fees under 42 U.S.C. § 1988. Hensley v. Eckerhart, 103 S. Ct. 1933, 1937 (1983). Although Petitioner prevailed in the district court, the trial judge denied Petitioner's request for attorney's fees. Petitioner cross-appealed this ruling, but the Seventh Circuit held against Petitioner on the merits and therefore dismissed the cross appeal. If the Seventh Circuit ultimately is reversed on the merits, Petitioner is then entitled to recover reasonable attorney's fees under 42 U.S.C. § 1988.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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December 1984

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 83-2638 & 83-2709

TOLEDO, PEORIA & WESTERN RAILROAD COMPANY, a Corporation,

Plaintiff-Appellee, Cross-Appellant,

v.

STATE OF ILLINOIS, DEPARTMENT OF TRANSPORTATION; JOHN D. KRAMER; J.E. HARLAND, and ALLEN AUSTIN,

Defendants-Appellants, Cross-Appellees.

Appeal from the United States District Court for the Central District of Illinois, Peoria Division.
No. 81 C 1067—**Robert D. Morgan**, *Judge.*

ARGUED APRIL 20, 1984—DECIDED SEPTEMBER 26, 1984

Before BAUER and WOOD, *Circuit Judges*, and WEIGEL, *Senior District Judge.**

WOOD, *Circuit Judge.* Defendants Illinois Department of Transportation (IDOT), its secretary, John Kramer, and two of its employees, J. E. Harland and Allen Austin, appeal a mandatory injunction directing them to restore to

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* The Honorable Stanley A. Weigel, Senior District Judge for the Northern District of California, sitting by designation.

plaintiff Toledo, Peoria & Western Railroad Company all possessory rights as the fee simple owner of a plot of land in East Peoria. Plaintiff brought this suit under section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982), alleging that the state had deprived it of its interest in the land without just compensation or due process, in violation of the fifth and fourteenth amendments. We hold that the federal courts lack jurisdiction over this matter as a section 1983 suit because a state agency is not a "person" within the meaning of the Civil Rights Act.

I.

In 1956, as the State of Illinois was preparing for construction of Interstate Highway 74, plaintiff conveyed to the state an easement for highway purposes over a plot of land in East Peoria known as Lot J. The state paid $6000 for the triangular 3.38 acres. In conjunction with construction of the interstate, part of the lot was used as a roadbed for the relocation of Camp Street.

Plaintiff repeatedly sought the state's release of the unused portion of Lot J. In 1965, the state prepared a preliminary "Plat of Vacation" as part of a possible land trade, but the trade never took place. In 1977, the state leased part of Lot J to an adjoining motel owner for use as a gravel parking lot, at $50 per month and terminable on five days notice. In 1980, the state prepared a second "Plat of Vacation" covering 2.708 acres of Lot J. The state's asking price was the appraised value of the land, $206,400.

Claiming that the state had abandoned its easement, plaintiff filed an action to quiet title in state court, which was dismissed on the ground that the Illinois Court of Claims had exclusive jurisdiction. Plaintiff also filed an action for damages in the Court of Claims, which is on hold pending resolution of this suit.

On April 29, 1981, plaintiff filed this section 1983 action against IDOT and its officials, charging that under color of state law they deprived the railroad of its interest in real property without just compensation or due process. Plaintiff originally sought both money damages and a mandatory injunction ordering the state to release its claim to the land; the district judge dismissed the prayer for damages as barred by eleventh amendment sovereign immunity, but held that injunctive relief was not barred. Finding that Illinois law provided no adequate legal remedy, the district judge held that the state had abandoned its easement for highway purposes, and ordered it to relinquish its claim to any interest in the property. Defendants appeal.

II.

We begin and end our inquiry by considering whether the federal courts have jurisdiction over this section 1983 suit. Section 1983 provides:

> Every *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983 (1982) (emphasis added). This court has held that "[s]tate agencies are not 'persons' for purposes of the Civil Rights Act." *Edelberg v. Illinois Racing Board*, 540 F.2d 279, 281 n.2 (7th Cir. 1976). The Third, Fifth, and Ninth Circuits agree. *See Ruiz v. Estelle*, 679 F.2d 1115, 1137 (5th Cir. 1982) (in enacting section 1983, Congress did not intend to override the traditional immunity of states and state agencies), *amended and vacated in part*, 688 F.2d 266, *cert. denied*, 103 S. Ct. 1438 (1983);

United States ex rel. Gittlemacker v. County of Philadelphia, 413 F.2d 84, 86 & n.2 (3d Cir. 1969) (rule that local governments are not "persons" (since overruled by Supreme Court) also applies to states), *cert. denied*, 396 U.S. 1046 (1970); *Bennett v. California*, 406 F.2d 36, 39 (9th Cir.) (state's immunity extends to suits under Civil Rights Act), *cert. denied*, 394 U.S. 966 (1969). *See also Ohio Inns, Inc. v. Nye*, 542 F.2d 673, 676, 680-81 (6th Cir. 1976) (state immunity not waived; open question whether state is "person" under section 1983), *cert. denied*, 430 U.S. 946 (1977).[1] This section 1983 action against IDOT, a state agency, fails for lack of federal court jurisdiction.

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[1] Several of the above cases, including our own *Edelberg*, rely on Supreme Court cases holding that municipalities and units of local government are not "persons" under section 1983. *See City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *Monroe v. Pape*, 365 U.S. 167 (1961). The Court since overruled *Monroe v. Pape* in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). In *Quern v. Jordan*, 440 U.S. 332 (1979), the Court held that *Monell* was limited to local governmental units not part of the state for eleventh amendment purposes, *id.* at 338, and concluded that Congress had not intended the Civil Rights Act to overturn the states' constitutionally guaranteed immunity, *id.* at 342. The Court also reaffirmed its language in *Edelman v. Jordan*, 415 U.S. 651 (1974), providing that "a federal court's remedial power [in a § 1983 suit brought by public aid recipients], consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, . . . and may not include a retroactive award which requires the payment of funds from the state treasury . . . ." *Id.* at 677 (citations omitted). Still more recently, the Court has indicated that eleventh amendment immunity, if not waived, would apply regardless of the nature of the relief sought. *See Pennhurst State School & Hospital v. Halderman*, 104 S. Ct. 900, 908 (1984). Assuming *arguendo* that states may be "persons" under section 1983 for prospective—injunctive and declaratory—relief only, we hold that the relief here requested by plaintiff ordering the state to release its interest in real property is fundamentally different from the "prospective" relief of *Quern* (ordering state officials to send class members explanatory notice of state administrative procedures) and *Edelman* (ordering state officials to conform their future conduct to federal statutes), and more similar to "retroactive" relief—money damages—barred by *Edelman*.

Plaintiff also brings this action against three state officials. A state official acting under color of state authority may be treated as a "person" under section 1983. *See, e.g., Drollinger v. Milligan*, 552 F.2d 1220 (7th Cir. 1977). The official may be sued in his own right, in a suit that is not against the state, for acts outside his statutory authority or for acts within authority that is claimed to be unconstitutional. *See Larson v. Domestic and Foreign Corp.*, 337 U.S. 682, 689, 690 (1949). Here, plaintiff does not claim that the IDOT officials acted beyond their authority, but that their authority to refuse to quiet title in plaintiff effectively denied plaintiff just compensation and due process. The availability of a remedy in the Illinois Court of Claims, however, satisfies the requirements of the fifth and fourteenth amendments for the purposes of this case. *See Larson*, 337 U.S. at 697 n.18; *Seifert v. Standard Paving Co.*, 64 Ill. 2d 109, 121, 355 N.E.2d 537, 541-42 (1976). The propriety of the officials' refusal to quiet title thus is a question only of state law. The eleventh amendment bars a federal action against state officials based on state law when the relief sought directly impacts the state. *Pennhurst State School & Hospital v. Halderman*, 104 S. Ct. 900, 917 (1984). Here the cause of action against the three IDOT officials would directly impact the state. It is the state that holds the disputed interest in the property, not the officials. We hold that this action nominally against the IDOT officials but in fact against the state also fails for lack of federal court jurisdiction.

III.

This attempt to expand the purview of the Civil Rights Act of 1871 to include a suit to quiet title is innovative at best. Even if states were persons within the meaning of section 1983, we doubt that Congress intended the Civil Rights Act to turn a real property title dispute into a federal case. We reverse the district court's decision and order, and remand with instructions to dismiss plaintiff's

suit. Because attorney's fees of course are not available to plaintiff under 42 U.S.C. § 1988 (1982), we dismiss plaintiff's cross-appeal.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

TOLEDO, PEORIA & WESTERN RAILROAD COMPANY, a corporation,	)	
Plaintiff,	)	
v.	)	No. 81-1067
STATE OF ILLINOIS DEPARTMENT OF TRANSPORTATION, JOHN D. KRAMER, J. E. HARLAND and ALLEN AUSTIN,	)	
Defendants.	)	

DECISION AND ORDER
ON MOTION TO DISMISS
(Filed September 4, 1981)

This complaint, under 42 U.S.C. 1983, names as defendants the State of Illinois Department of Transportation, John D. Kramer, as Secretary of that Department, and J. E. Harland and Allen Austin, as supervisory employees thereof. It prays a mandatory injunction or, alternatively, money damages alleged to arise in the premises.[1]

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1. At argument on the motion to dismiss now pending, plaintiff conceded that it is not entitled to an award of money damages. A claim for damages is now pending before the Illinois Court of Claims.

It is alleged, and presumed to be admitted for the purpose of the pending motion, that plaintiff, on August 8, 1956, for a consideration of $6,000, executed and delivered to appropriate officials of the State of Illinois a "Dedication of Right of Way for Public Road Purposes" of a certain tract of land therein described. By the instrument, plaintiff did "grant, convey and dedicate" the premises "to the People of the State of Illinois, for the purpose of a public highway," and did warrant "that this instrument conveys the highway easement purported to be granted herein." A significant provision of the instrument, as indicative of the purport thereof, is the provision that plaintiff would, "as a part of this dedication," remove obstructions, buildings, etc., from the tract and "completely vacate the same within fifteen (15) days after

notice in writing from the Department of Public Works and Buildings of the State of Illinois," and authorize such officials "to enter into and take full and complete possession of said tract," upon such notice given.

The complaint alleges that the tract of land is not used by the Department as a highway, but that it is now leased by the Department "to the adjoining property owner for use as a parking lot for motel patrons." It further alleges that officials of the Department have offered to sell the tract to plaintiff for an appraised value of the fee interest in the amount of $206,400.

Plaintiff alleges that it was deprived of due process of law and just compensation for its property, under the Fifth and Fourteenth Amendments to the Constitution of the United States, by the defendants' action taken under color of

State law. It seeks a mandatory injunction "directing the Department of Transportation of the State of Illinois to release any and all claim of interest" in the parcel of real estate involved.

Defendants move to dismiss the complaint on the basis of the State's sovereign immunity from suit under the Eleventh Amendment to the Constitution.

If this action be maintainable, the court ultimately must determine as a matter of law the proper construction of the 1956 "Dedication." Any consideration of that ultimate issue is now premature, but certain characterizations of that instrument must be alluded to in conjunction with the disposition of the pending motion to dismiss.

> The Eleventh Amendment is clear and simple. It states:
>
> "The Judicial power of the United States shall not be construed to to extend to any suit in law or

> equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The complaint only alleges that plaintiff is a corporation "licensed to transact business in the State of Illinois," without any statement as to the State of its citizenship. It is, however, clear that, even if plaintiff be domiciled in Illinois, the Eleventh Amendment is a bar to any claim for monetary damages. Edelman v. Jordan, 415 U.S. 651, 662-663 (1974), and cases cited. Edelman approved the institution of an action by residents of Illinois, under section 1983, against officials of that state for remedial prospective relief only, the Court saying that any claim for a money judgment, which would have to be met by the State's treasury, is a suit against the State itself, Ibid. at 677.

A review of reported cases reveals

that the precise question presented on this motion, as it relates to the prayer for injunctive relief, is not resolved by clear precedent. The precise question here is: Would a mandatory injunction directing the Department of Transportation to release any claim to the fee interest in the land arising from the dedication instrument be the equivalent of an order to compel the State to pay money which was wrongfully withheld in the past, or the equivalent of an order to pay money as benefits in the future? If the answer to that question is affirmative, then the Eleventh Amendment does bar the plaintiff's claim. Edelman v. Jordan, supra; Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945); Smith v. Reeves, 178 U.S. 436 (1900); cf. Monaco v. Mississippi, 292 U.S. 313 (1934).

Edelman presents the most recent

statement of the distinction, which must be recognized between money claims and claims for prospective relief when the Eleventh Amendment is invoked. Edelman was a class action suit based upon allegations that Illinois officials had violated applicable federal regulations governing the federal-state program for aid to the blind, the elderly, and the disabled, which resulted in depriving the entitled class members of certain payments to which they were found to have been entitled. The trial court held that procedures followed by the Illinois officials were invalid under federal law. It granted a permanent injunction which mandated that there be prospective compliance with the regulations. It also entered a judgment requiring that the defendants pay retroactive benefits which had been wrongfully denied to the class members. On appeal, the Court of Appeals

for the Seventh Circuit affirmed, treating the judgment for retroactive benefits to be an award of "equitable restitution" which was not barred by the Eleventh Amendment. The Supreme Court rejected the concept of "equitable restitution." Citing the Ford Motor case, it said that the Eleventh Amendment barred any suit to impose a money liability which must be paid by public funds. Ibid. at 663, 668. It affirmed the decree for prospective relief and remanded the cause for further proceedings. Id. at 677.

The cause came before the Supreme Court again in Quern v. Jordan, 440 U.S. 332 (1979). Following remand, the trial court ordered the defendant state officials to send to each member of the class a notice stating, in effect "you were wrongfully denied benefits" of an amount to be stated in each such notice, and to

include with that notice an appeal form for the institution of a state administrative procedure to recover the stated amount. The Court of Appeals reversed and remanded, holding that the notice ordered by the trial court was tantamount to a judgment against the State, in violation of the amendment. It directed that, on remand, the trial court could require that the officials serve an explanatory notice stating, in effect, that the federal action was at an end and that there was an available administrative remedy to which the individuals might avail themselves. Ibid. at 334-336. The Supreme Court affirmed, saying that the notice directed by the Court of Appeals was simply advisory to recipients thereof, that state procedures did exist. A federal court may, consistent with the amendment, enjoin state officials to conform their conduct, pros-

pectively, to the requirements of federal law, even if the injunction may have an ancillary effect on the state treasury. Id. at 337.

Georgia R. Co. v. Redwine, 342 U.S. 299 (1952), was a suit against state officers to enjoin the implementation of a statute which had the effect of voiding a previously existing tax exemption created by a legislative charter to the railroad. The Court said that a suit against a state official to enjoin him from taking a threatened action in violation of the Federal Constitution, is not a suit against the State. It said that neither the Eleventh Amendment nor the existence of an effective remedy in the state courts deprived the trial court of jurisdiction. Ibid. at 303-306.

Ex parte Young, 209 U.S. 123 (1908), approved the power of a federal court to enjoin a state official from enforcing a

statute which allegedly violated the Fourteenth Amendment. The Court said that it was not a suit against the State, but only a suit to enjoin a state officer from taking threatened unconstitutional action. In that context it said that the sovereignty of the State was not involved and that reliance could not be placed on State sovereignty to immunize State officials against unconstitutional acts. Ibid. at 167.

In another context the Court said that section 1983 opened the federal courts to private citizens, offering a unique federal remedy against incursion by state officials under color of state law upon rights secured by the Constitution and federal laws. Mitchum v. Foster, 407 U.S. 225, 239 (1972). The statute was designed to protect the private individual from such incursions, whether the same be done by the executive, legis-

lative, or judicial branch of state government. Ibid. at 242.[2]

Defendants do not suggest that the complaint is insufficient to state a section 1983 claim. They only argue that the Eleventh Amendment bars the prosecution of a suit on that claim. Thus, the critical issue on this motion must depend upon a determination as to the precise nature of the remedy which plaintiff seeks.

Plaintiff contends that the dedication instrument granted only an easement to the state officials for the specific purpose of maintaining a public highway, and that the defendants' interest terminated, under Illinois law, when the land

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2. Mitchum sustained the right of an individual to prosecute a suit for an injunction to bar the State of Florida from prosecuting a state court proceeding to enforce a state statute which was alleged to violate the Fourteenth Amendment. Id. at 243. The precise issue was the question whether the 1983 suit was barred by the anti-injunction statute. 28 U.S.C. 2283.

ceased to be used for that purpose. It further contends that the defendants, acting in their official capacity and under color of state law, interpret that instrument as a conveyance of the fee interest in the land without just compensation and without, according to plaintiff, due process of law. The crux of the prayer for injunctive relief is that the defendants be enjoined from asserting a claim to the fee interest in the premises. Further comment upon the merit of that position is not appropriate at this stage of litigation, except the observation that the granting of an injunction, assuming the validity of plaintiff's theory, would not have the effect of depriving the defendants of the State of Illinois of any existing interest in the land itself. The court does have jurisdiction to entertain this suit, notwithstanding the provisions of

the Eleventh Amendment.

Defendants also contend that plaintiff may obtain an adequate remedy by the prosecution of a claim before the Illinois Court of Claims. It is far from certain that that is a valid position. It is also unnecessary to consider the scope of jurisdiction accorded by statute to that Court of Claims. Given the fact that the complaint is sufficient to state a claim based upon the Federal Constitution, plaintiff is entitled to pursue that claim in federal court, irrespective of the existence of some parallel state court remedy. Georgia R. Co. v. Redwine, supra, at 303-306.

For the reasons stated, IT IS ORDERED that the complaint is dismissed to the extent that it seeks money damages, and that in all other respects the defendants' motion to dismiss is DENIED.

IT IS FURTHER ORDERED that defendants file their answer within twenty (20) days.

/s/ Robert D. Morgan
Robert D. Morgan
United States District Judge

Entered: Sept. 4, 1981

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

TOLEDO, PEORIA & WESTERN RAILROAD COMPANY, a corporation,	)	
Plaintiff,	)	
v.	)	No. 81-1067
STATE OF ILLINOIS DEPARTMENT OF TRANSPORTATION, JOHN D. KRAMER, J. E. HARLAND and ALLEN AUSTIN,	)	
Defendants.	)	

DECISION AND ORDER
(Filed September 16, 1982)

This complaint, under 42 U.S.C. §1983, names as defendants the Illinois Department of Transportation (IDOT) and three of its officials. The complaint alleges that plaintiff, in consideration of $6,000, executed and delivered to the State in 1956 a "Dedication of Right of Way for Road Purposes" in a certain parcel of described real estate; that the tract of land is not used for road purposes, but that the same has been leased by IDOT to an adjoining property

owner for use as a motel parking lot, and that plaintiff demanded possession of the premises, but that the IDOT officials have refused unless plaintiff will pay to IDOT the sum of $206,000, the now-appraised value of the fee interest. The complaint prays a mandatory injunction against the defendants, requiring them to release any and all claim of interest in the real estate.[1]

The theory of complaint is that plaintiff is denied due process of law in the premises by the individual defendants, as officers of IDOT acting under color of state law. The defendants claim that the State of Illinois acquired a fee interest in the land under the dedication instrument. They have now moved for summary judgment in their favor.

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1. On September 4, 1981, the complaint was dismissed by stipulation, to the extent that it prayed the award of money damages.

There were two prior motions by defendants to dismiss the complaint, both of which were denied. The denial order now of interest was entered September 4, 1981. That motion was based upon the contention that the suit is a suit against the State itself, which would be barred by the Eleventh Amendment to the federal Constitution. Defendants renew that position in reliance upon Parratt v. Taylor, 451 U.S. 527 (1981). Parratt has been fully considered and it is not deemed to be apposite to this cause or in any manner inconsistent with this court's prior resolution of the Eleventh Amendment question.

The question whether any genuine issue as to any material fact is present which would preclude summary judgment, must be approached from the proper construction of the instrument of conveyance. Absent any ambiguity on the face

of the instrument, its construction is solely a question of law to be determined from the face of the instrument itself. The defendants' position that the fee was conveyed is wholly inconsistent with the face of the instrument. The operative language is that plaintiff did "grant, convey and dedicate" the real estate "for the purpose of a public highway." The warranty clause warrants that the instrument does convey "the highway easement purported to be conveyed herein." The time for delivery of possession was not precisely fixed by the instrument. What it did provide was that plaintiff, within fifteen days after written notice from IDOT of IDOT'S intent to take possession, would "completely vacate the premises" to permit IDOT to take possession. It must be concluded that the instrument conveyed only an easement for highway purposes.

Defendants' references to Ill. Rev.

Stat. 1979, ch. 121, § 4-508, and Ill. Rev. Stat. 1979, ch. 30 § 12, do not support its position. Section 4-508 is the section of the eminent domain statute which defines procedures for the disposition of unneeded lands taken by eminent domain. Section 12 is a part of the general conveyances statute which provides, in essence, that the conveyance of the fee is presumed, absent conditions of limitations in a title document which define some lesser interest. Defendants argue that the verbs "grant" and "convey" effectively conveyed the fee within the intendment of the conveyance statute. The argument conveniently overlooks the verb "dedicate" which is an essential part of the granting clause. To "dedicate" is "To appropriate and set apart one's private property to some public use * * *." Black's Law Dictionary, Revised Fourth Edition. A dedication is an

appropriation of land by its owner for any public use, which reserves to the owner all legal rights in the land which shall be compatible with the full exercise and enjoyment of the public use for which the property was dedicated. Alden Coal Co. v. Challis, 200 Ill. 222, 232 (1902); DuPont v. Miller, 310 Ill. 140, 146 (1923).

Upon the dedication of an easement for highway purposes, the fee interest in the land remains vested in the grantor subject to the burden of the easement. Although the easement is perpetual and not affected by simple non-user, the easement is extinguished upon the abandonment thereof by the state. E.g., Clokey v. Wabash Ry. Co., 353 Ill. 349, 360-361, 370 (1933); Chicago & E.I. R. R. Co. v. Clapp, 201 Ill. 418, 424 (1903); Schnabel v. County of DuPage, 101 Ill. App. 3d 553, 428 N.E.2d 671, 675-676

(2d Dist. 1981); Department of Transp. v. Thomas, 59 Ill. App.3d 684, 375 N.E.2d 834, 837 (5th Dist. 1978). The property right granted by the easement revests, by operation of law, in the fee owner upon the act of abandonment. E.g., Ill. Rev. Stat. 1979, ch. 121, § 9-127; Clokey v. Wabash Ry. Co., supra; Schnabel v. County of DuPage, supra.

Therefore, this cause presents the genuine issue of material fact as to whether or not there was an abandonment, an issue which cannot be decided on a motion for summary judgment.

Defendants finally contend that this is, in reality, a suit against the State of Illinois which is barred by the Illinois Court of Claims statute. Ill. Rev. Stat. 1979, ch. 37 §439-1 et seq. It cites Sass v. Kramer, 72 Ill.2d 485, 381 N.E.2d 975 (1978), in support of its position.

The Illinois courts have said clearly that the question whether a suit against a state official is in fact a suit against the State must be determined with reference to the particular issues presented by the complaint and the ruling which is sought. E. H. Swenson & Son, Inc. v. Lorenz, 36 Ill.2d 382, 384, 385 (1967); Moline Tool Co. v. Department of Revenue, 410 Ill. 35, 37 (1951).

The one issue which remains for decision under this complaint is the factual issue whether or not the easement granted to the State has been heretofore abandoned. Thus the complaint alleges that the easement for highway purposes was granted to the State; that the land is not used for highway purposes; that IDOT has leased the land to a private owner for use as a parking lot; that officials of IDOT have attempted to construe the dedication instrument as a

conveyance of the fee in the land, and that they have refused to return the land to plaintiff's possession unless plaintiff will pay the current appraised value of the fee interest. The sole remaining prayer for relief is that a mandatory injunction issue requiring the named defendants to release the allegedly illegal claim of a subsisting interest which they have asserted in the land.

Applicable Illinois law must also be considered as a part of the complaint. A virtually unbroken line of decisions has consistently held that the easement granted by a dedication is extinguished whenever the easement has been abandoned and the property right granted by the easement revests in the owner of the fee at the time of abandonment by operation of law. E.g., Clokey v. Wabash Ry. Co., supra; Schnabel v. County of DuPage, supra.

This complaint rests upon the premises that the interest which the State obtained under the 1956 dedication terminated at the time when, as it is alleged, the easement was abandoned by IDOT, and that any claim of a property right which the defendants now assert is an attempt on their part to deprive plaintiff of its property without any legal basis for such claim. Consistently with the decisions hereinabove cited, it must be concluded that neither the allegations of the complaint nor the prayer of the complaint seek to touch or affect any subsisting property right of the State of illinois.

Yet, defendants insist that the Sass decision is controlling, and that it compels a conclusion that this is a suit against the State. That argument must be rejected.

It is difficult to determine, from

reading the majority opinion in Sass, precisely what the basis for the court's decision was. Sass arose on a complaint to quiet title to land, based upon the premise that a previously dedicated highway easement had been abandoned. What is certain from reading Sass is that the court proceeded on the assumption that the easement was not abandoned and that therefore the suit did affect property of the State of Illinois.[2]

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2. The complete factual background of Sass cannot be determined from the opinion. What does appear is that the plaintiff had dedicated land for use in the construction of a highway interchange. At a later date, the interchange was redesigned and reconstructed and paving upon a part of the tract dedicated by plaintiff was removed by IDOT. The plaintiff, not satisfied with negotiations with IDOT officials, sought and obtained the passage of a private bill by the Illinois Legislature. That bill directed IDOT to release the easement upon the payment by plaintiff of the then-appraised value of the easement. The plaintiff elected to file a suit to quiet title, rather than make the payment required by the private legislation. Upon a trial, the court held the private legislation to be unconstitutional and held that the easement had been abandoned. The Supreme Court reversed.

One must wonder whether a majority of the Justices were influenced by the legislative determi-

The court treated the cause as a suit to vacate the easement, and thus a suit against the State itself. 381 N.E.2d at 977. Any other interpretation of Sass would have to assume, without justification, that the court, by its silence, overruled the whole line of prior Illinois decisions, which is exemplified by Clokey and Schnabel, and voided the provisions of Ill. Rev. Stat. 1979, ch. 121,§ 9-127, which related to the abandonment or vacation of highways which were dedicated on a statutory plat. This complaint does not contest the fact that the State did obtain an easement in the land. If the allegations as to abandonment are proved, the State's interest was terminated by operation of law when the easement was abandoned. What the complaint does contest is the act of these

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nation that there was a subsisting easement vested in the State. In any event, the majority treated the complaint as a suit to vacate a subsisting easement.

defendants, acting under color of state law, which not only refused to recognize that legal result but also attempted to claim, on behalf of the State, the fee interest which the State at no time possessed.

Serious federal constitutional questions must arise if Sass be interpreted as holding that a complaint which requires a factual determination as to the issue of abandonment must be held to be a suit against the State itself. Equally critical questions must arise if Sass be interpreted to require that resolution of that factual issue must begin with an assumption that the easement remains in force. That assumption, within the context of this complaint, would not only deprive the plaintiff of the benefit of Illinois law related to such easements, but it would also effectively deprive plaintiff of any effective legal remedy.

Accordingly, IT IS ORDERED that the motion for summary judgment be DENIED.[3]

/s/ Robert D. Morgan

Robert D. Morgan

United States District Judge

Entered: Sept. 16, 1982

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3. A pending motion by plaintiff to strike substantial parts of an affidavit of John E. Harland, which is attached in support of the motion for summary judgment, is rendered moot by the decision herein. However, it may be noted that the affidavit of Harland, who is Chief Engineer for District 4 of IDOT, is largely conclusory and, therefore, objectionable.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

TOLEDO, PEORIA & WESTERN RAILROAD COMPANY, a corporation,	)	
Plaintiff,	)	
v.	)	No. 81-1067
STATE OF ILLINOIS DEPARTMENT OF TRANSPORTATION, JOHN D. KRAMER, J. E. HARLAND and ALLEN AUSTIN,	)	
Defendants.	)	

DECISION AND ORDER ON MOTION
FOR JUDGMENT ON THE PLEADINGS
(Filed June 1, 1983)

Defendants have filed a motion for judgment on the pleadings, which rests upon the following contentions:

1. That the complaint fails to adequately allege that plaintiff has been denied a constitutionally protected right without due process of law.

2. That the State affords an adequate remedy to plaintiff under the Illinois Court of Claims Act.

3. That the Illinois Department of Transportation (IDOT) is not a person

within the intendment of 42 U.S.C. § 1983, and that the suit cannot be maintained as to that Department.

This court has considered two previous defense motions to dismiss this complaint and a previous motion by defendants for summary judgment. By its decision and order entered on September 4, 1981, the court rejected the defendants' contention that this complaint is barred by the sovereign immunity provisions of the Eleventh Amendment. By its decision and order entered September 16, 1982, the court rejected defendants' prayer for summary judgment. In the context of that decision, the court reviewed the provisions of the basic grant of easement and the Illinois law as it relates to that grant of an easement, as a predicate for its conclusion that a genuine issue as to a material fact yet remained in the cause for decision. No

purpose is served by repeating what was said in those decisions.

Plaintiff responds to the present motion, in part, by its statement that defendants are pouring the same old wine out of a new bottle. That observation seems an accurate characterization of the current motion, at least with reference to the first two arguments made. No further basis need be stated for rejecting those two contentions, but recognition is given, briefly, to the new wine bottle.

The constraint imposed by the Due Process Clause, when it is contended that a state does provide an adequate remedy at law, requires not only that the state does provide a remedy, but also that the available remedy be adequate and expeditious to redress the claimed constitutional violation. Parratt v. Taylor, 451 U.S. 527, 543-544 (1981). Cf. Paul v.

Davis, 424 U.S. 693, 699, 700 (1976); Bonner v. Coughlin, 517 F.2d 1311 1319-1320 (7th Cir. 1975), modified, 545 F.2d 565 (1976), cert. denied, 435 U.S. 932. Actually, the issue involved in each of those cases was the question whether a Section 1983 suit would lie to redress alleged tortious conduct by state officials.

A due process basis for this complaint is adequately and accurately stated in this court's September 16, 1982 decision. The plain fact is that Illinois does not provide this plaintiff with an adequate remedy at law. It alleges that it has been deprived of its property by acts of a state agency and state officials without compensation. The defendants themselves set the value of the property involved at $206,400. Not only is this plaintiff deprived of any equitable relief by the State, but

also its rights before the Court of Claims would be limited to a maximum money recovery of not to exceed $100,000. The court is satisfied that there is an adequate allegation of the denial of due process of law, when the factual basis for the complaint is measured by precedents established by the statutes and courts of the State.

Consideration must be given to the contention that IDOT is not a person within the intendment of Section 1983, and that, thus, the suit against it cannot be maintained. Only one cited authority does make the statement that neither a state nor a state agency is a person within the meaning of Section 1983. Ruiz v. Estelle, 679 F.2d 1115, 1137 (5th Cir. 1982). On the other hand, Quern v. Jordan, 440 U.S. 332, 338-345 (1979), fully reviewed the question whether Section 1983 can be construed as

an implied waiver by a state of its sovereign immunity under the Eleventh Amendment. Nothing in that long discourse can be construed as touching the person-nonperson issue.[1] Compare Main v. Thiboutot, 448 U.S. 1, 3-8 (1980), in which the Court held that a Section 1983 class action would lie to redress a claim that a state had deprived the plaintiffs of benefits to which they were entitled under the federal Social Security Act.[2]

No case is either cited to or found by this court which is precisely apposite to the issues presented here. The Supreme Court has said that Section 1983

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1. Mr. Justice Brennan, concurring, states that, in that context, the majority opinion was a gratuitous discourse upon an issue which had been neither briefed nor argued by any party to the cause.

2. In a dissenting opinion, Mr.Justice Powell construed the decision as a significant and unwarranted intrusion of the federal system upon state sovereign immunity. Ibid. at 22-24.

offers a unique federal remedy to private citizens against incursion under color of state law upon rights of the citizen which are secured by the Constitution. Mitchum v. Foster, 407 U.S. 225, 239 (1972). It would seem to be inherent in that unique federal remedy that the statute would authorize a judgment which is both adequate to redress that incursion and not inconsistent with the Eleventh Amendment. Other reported cases have looked to the remedy necessary for redress, the only concern being that state sovereignty was preserved. Parratt, Quern, Paul, Main, Bonner, Mitchum, all supra; Edelman v. Jordan, 415 U.S. 651 (1974); Georgia R. Co. v. Redwine, 342 U.S. 299 (1952); Ex parte Young, 209 U.S. 123 (1908).

A state is an entity which can only act through its duly constituted officials. The sovereignty issue has been

construed as a restraint against any decision which would impose a money judgment which must be met by the state's public funds. E.g, Edelman v. Jordan, supra; Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945); Smith v. Reeves, 178 U.S. 436 (1900). A permissible judgment must be limited to prospective relief. Thus, Edelman reversed a judgment for the payment of benefits determined to have been wrongfully denied to the plaintiffs, while the later decision in Quern approved a judgment order, entered on the Edelman remand, which would require state officials to notify all members of the class involved that they did have a right to pursue a state remedy for recovery of those same denied benefits.

Of the recent cases herein cited, each, Parratt, Paul, and Bonner, was a suit based upon allegations that named

state officials had committed tortious acts which deprived the plaintiff of property. Quern, Edelman, and Maine each involved the deprivation by state officials of benefits to which the particular class was entitled under the Constitution or laws of the United States. Ruiz was a class action alleging numerous constitutional violations by the State of Texas in the operation of its prison system. In each of those cases, full prospective relief was available through an injunction running against appropriate state officials.

Yet it is clear that each involved an official action by the state itself, unaffected by the fiction that some state official, not the state, was the culprit. It is also clear in those cases that full prospective relief for the state's default could be achieved by a judgment against a state official. Quern clearly

recognized where the onus lay in its approval, as a part of that prospective relief, of a judgment requiring that each member of the class be notified that he or she did have a claim which might be pursued against the state, not the state official. In the Ruiz case, the one cited opinion which touches the "person" question, the impact of a prospective order to compel the director to cure numerous constitutional deficiencies in the Texas prison system must fall directly on the shoulders of the Texas Department of Corrections, whether or not it remained as a party to the suit.

It would be singular if this court must decide, assuming for purposes of this motion that all material allegations of the complaint are true, that this plaintiff is unconstitutionally deprived of its property by IDOT and its officials, but that it has only a hollow

remedy, because it is doubtful that an injunction against the director alone could acnieve equity in the premises. If the provisions of Section 1983 are to be given full effect, those provisions must reach the person or agency which was guilty of the unconstitutional act, and which can rectify it. This seems to be a case which compels cutting away the fiction and recognizing that a state agency may, in a proper case, be made a party to a Section 1983 action.

The state is fully protected. No demands are made on its treasury, against its property, or upon the constitutional prerogatives of its sovereignty. By the same token, Section 1983 should not be construed to permit a state, through its officials and agencies, to usurp valuable property rights without any semblance of due process and thwart any meaningful

redress for its act by hiding behind a legal fiction.

Accordingly, IT IS ORDERED that the motion for judgment on the pleadings is DENIED.

/s/ Robert D. Morgan
Robert D. Morgan
United States District Judge

Entered: June 1, 1983

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

TOLEDO, PEORIA & WESTERN RAILROAD COMPANY, a corporation,	)	
Plaintiff,	)	
v.	)	No. 81-1067
STATE OF ILLINOIS DEPARTMENT OF TRANSPORTATION, JOHN D. KRAMER, J. E. HARLAND and ALLEN AUSTIN,	)	
Defendants.	)	

DECISION AND ORDER
(Filed August 11, 1983)

Plaintiff's complaint prays a mandatory injunction against IDOT[1] and certain IDOT officials to compel the release of any claim of interest in a certain parcel of real estate in East Peoria, Illinois, which is designated by IDOT as Lot J. The State obtained an easement in that parcel for public highway purposes, by a written dedication dated August 8, 1956. Prior to trial, decisions and orders of the court were

1. The Illinois Department of Transportation.

filed, respectively, on September 4, 1981, September 6, 1982, and June 1, 1983, which disposed of all legal issues presented in the cause. A bench trial was held, limited to the factual question whether or not the easement granted to the State for that specific public purpose had been abandoned by IDOT. The cause is now before the court for decision of that factual issue. If it must be found that the easement for the stated public purpose has been abandoned, all rights of the State, as represented by IDOT, have been extinguished by operation of the law of Illinois.

SPECIAL FINDINGS OF FACT

Lot J is a triangular parcel of land, to the extent of 3.38 acres, which fronts on Camp Street in the city of East Peoria. The dedication was made in conjunction with plans for the construction of Interstate Highway 74 which, as

constructed, traverses the area some distance north of the northernmost boundaries of Lot J. Only about .25 acre of Lot J was employed as roadbed in the total project of I-74 construction. A part of Camp Street was relocated to traverse the southeastern tip of Lot J. No other part of the lot has since been used as roadbed.

In 1956, Lot J was a steeply-sloped hillside, with the toe of the slope abutting the north line of Camp Street, being supported in part by a concrete retaining wall. IDOT did remove substantial overburden from Lot J in conjunction with the I-74 construction, which was used, among other purposes, for the reconstruction of a part of Fondulac Drive and of an overpass of Fondulac across the route of I-74. No part of either I-74 or Fondulac Drive is situated on Lot J, though the toe of the abutment of the Fondulac over-

pass does closely abut the lot's northerly extremity. Fondulac Drive is controlled and maintained by the Fondulac Park District, with IDOT's obligation toward it being limited to the maintenance of the overpass itself.

Between 1956 and 1963 both the State and the plaintiff removed overburden from Lot J, which created its present topography. Since 1963 the lot has been relatively level, with a north to south grade of approximately 9%, extending roughly from the toe of the Fondulac abutment southward toward Camp Street. An earthen berm does traverse a part of Lot J in a roughly east-west configuration, which includes a corrugated metal pipe to drain water through the berm and into a ditch adjacent the roadbed of Camp Street.

Beginning in 1963, negotiations were initiated by plaintiff with IDOT for the release of the highway easement over Lot

J, with the exception of that part incorporated into the roadbed of Camp Street. In February 1965, IDOT engineers prepared a preliminary "Plot of Vacation," which included about 2.05 acres of the original lot, and which excluded a route of access to the toe of the Fondulac abutment and additional right-of-way adjacent to Camp Street.

Further negotiations continued sporadically over a number of years, which included proposals for the trade of other lands for the proposed I-474 Peoria bypass, for the easement in Lot J, but they led to no solution to the dispute. In the interim, on June 30, 1977, IDOT entered into a rental agreement with an adjacent landowner for the use by such owner of a part of Lot J for a motel parking lot, and to give such owner access from its motel premises to Camp Street.

Beginning on January 24, 1980, plaintiff's agents met with IDOT engineers to discuss the release of the Lot J easement. The engineers agreed to prepare a boundary survey of the lot and, once that was prepared, to discuss the possibility of releasing the easement, based upon that boundary survey. Plaintiff was advised by IDOT's District Engineer in early June that IDOT would develop an appraisal of the property and provide a survey of the land to be vacated. In the same month, a second vacation plat and legal description were prepared by IDOT for the vacation of 2.708 acres of the original lot, reserving a way of access to the toe of the Fondulac abutment. By a letter dated July 21, 1980, plaintiff was advised by IDOT that the fee interest in the 2.708 acres described in the vacation plat had been appraised as having a value of

$206,400, and that IDOT's claim would be vacated upon the payment of that sum to the State. This litigation followed that proposal.

Plaintiff claims that Lot J was abandoned for the public purpose for which the land was originally dedicated.[2] It relies upon the non-user of the lot for highway purposes for a period of about 27 years, the lease of a part of the lot for commercial purposes, and the action of IDOT over a period of almost 20 years, geared to the prospect of the release of the easement, and specifically, the proposal of IDOT for the sale of a substantial part of the lot to plaintiff, as clear proof that the easement has been abandoned.

IDOT claims that the lot now is, and

---

2. That claim excludes the small area which was used for the relocation of Camp Street which was clearly used for the intended public purpose.

has been continuously, held in trust for highway purposes. However, IDOT has not supported that claim with any credible evidence. The exhibit evidence does reflect a statement by an IDOT agent in 1970 that the lot might be used for the rerouting of Main Street in East Peoria, yet the credible evidence compels the finding that any proposed rerouting of Main Street has long since been abandoned. No IDOT witness testified to any intention to locate any public way on the unused portion of the lot. The remaining contentions of IDOT are limited to the position that the retention of Lot J is essential to the lateral support of Fondulac Drive, and the further position that Lot J is essential to drainage control to lessen the flooding of Camp Street. Neither contention is supported by the weight of the evidence.

The only witness who testified with

regard to any concern for lateral support stated that excavation of the toe of the slope of Fondulac Drive would jeopardize the integrity of support for that street. However, the evidence conclusively shows that only a very small part of the lot abuts the toe of the Fondulac slope. That witness, IDOT's District Engineer, testified on cross-examination that reservation of an easement over the northerly edge of the lot adjacent the Fondulac slope would remove any concern related to the need for lateral support. Moreover, the parcel of land immediately adjacent to Lot J on the west has similar slopes. The same has been developed into a motel complex, and there is absent any evidence that that development has created any threat of subsidence of Fondulac. The witness further testified that he had never examined soil boring logs for State property in the vicinty,

and that he has no training or experience as a geotechnical engineer. Thus, his reservation regarding any threat of subsidence must rest solely upon the physical configuration of the land.

The preponderance of the evidence compels the finding that Lot J has no tendency to help prevent flooding on Camp Street during heavy rains. The evidence adduced tends only to prove that an area of Camp Street which lies to the east of Lot J does have a propensity to flooding in heavy rainstorms, a propensity which is not shown to be affected by continuation of the current configuration of Lot J.

The total evidence reveals affirmative proof of only one incident of the flooding of Camp Street. On June 2, 1980, a hundred-year-cycle storm struck the East Peoria area, which caused the closing of Camp Street for some brief

period of time. The flooding occurred in a lowlying area to the east of Lot J. Witnesses for both parties agreed that flooding in that area during a similar storm was inevitable because the natural drainage pattern was southerly, toward Farm Creek, while the flow of water southerly from that area was blocked by the enbankments of rail lines of the plaintiff and the Norfolk and Western Railroad. Any finding that any significant flooding problem exists, except in the advent of an extremely severe storm, would be wholly speculative.

It would also be totally speculative to find that Lot J, in its present configuration, would have any tendency to alleviate such problem as does exist. Largely, the flow of water over the lot comes from rain falling on the toe of the Fondulac abutment, on the lot itself, and, to some extent, drainage which flows

easterly from a part of the motel complex onto Lot J. It does not drain Fondulac Drive. In the vicinity of Lot J, Fondulac runs arcuately on a southeasterly-northwesterly course, with the pavement surface area of the Drive being sloped to drain to the north. A gathering ditch, or channel constructed on the slope of the Fondulac abutment, follows the same arcuate course as does the highway, ultimately draining to the north through a culvert under the roadbed of Fondulac.

The soils of Lot J are silty clay and shale which is substantially impermeable. That soil characteristic, coupled with the southward grade of about 9%, compels the inference that substantially all water traversing Lot J, or falling on the lot, will ultimately drain into the ditches adjacent to Camp Street. There is no credible evidence as to any

significant ponding of water on the lot, but only evidence that there is some insignificant puddling of water in the event of heavy rain. The previously-mentioned earth berm tends only to channel a substantial part of the water into a single course through a culvert and ultimately into the Camp Street ditch.

Moreover, the evidence as a whole raises no inference that there is any serious flooding problem on Camp Street, but only that the street does become flooded when the area is subjected to record rainfall. The witnesses who testified to the subject agreed that the most significant cause of flooding under record rainfall conditions is the absence of culverts which would permit water to follow its natural course into Farm Creek. There is absent any credible evidence that the situation would be significantly altered irrespective the

identity of the party in possession of, or the use of, Lot J.

Both the lateral support and drainage arguments by IDOT must be viewed upon the evidentiary record as straw men designed to cloud the historical background, which tends to reflect an admission by IDOT that only a small part of Lot J is used for highway purposes.

The court finds that IDOT has abandoned the purpose for which Lot J was dedicated to public use in 1956. Its actions since 1963 negate any other inference. Discussion initiated in that year led to the preparation by IDOT engineers in 1965 of a tentative plat of vacation of a substantial part of the lot. The District Engineer testified that such a plat would not have been prepared unless IDOT was considering the vacation of the easement, or, stated differently, if IDOT still considered the

land to be necessary for highway purposes. The June 1980 tentative plat of vacation and legal description of a substantially larger part of Lot J was coupled with an offer by IDOT to sell the land to plaintiff for $206,400. The necessary inference that the purpose of the dedication has been abandoned is fortified by the act of IDOT in 1977 of leasing a substantial part of the lot to an owner of adjacent land for use as a parking lot and as a route of access to Camp Street.

Although the evidence on the point is rather tenuous, the continued existence of an easement over the northerly edge of Lot J, to afford access to the toe of the Fondulac abutment, will be recognized.

CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties and the subject matter in this cause.

2. All legal issues presented have been fully disposed in the court's prior decisions herein. They need not be repeated, as such prior decisions fully state the legal basis for this decision.

3. The effect of the abandonment by IDOT of the public purpose for which the easement in Lot J was granted, is to release the easement by operation of Illinois law, except as to those parts of the premises which are shown to have been devoted to that public purpose.

Judgment is entered for the plaintiff and against all defendants. A mandatory injunction will issue directing the defendants, and each of them, as agents of the State of Illinois, to take all action which may be necessary to vacate IDOT's claim under the dedication to all that part of Lot J as shown by Plaintiff's Exhibit 12, and legally described in Plaintiff's Exhibit 9, to

restore to plaintiff all possessory rights as the fee simple owner thereof, and to quiet title in plaintiff thereto.

IT IS SO ORDERED.

/s/ Robert D. Morgan
Robert D. Morgan
United States District Judge

Entered: August 11, 1983

JUDGMENT IN A CIVIL CASE
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

TOLEDO, PEORIA & WESTERN RAILROAD CO.	)	Judge Robert D. Morgan Senior Judge
Plaintiff,	)	
v.	)	No. 81-1067
STATE OF ILLINOIS DEPT. OF TRANSPORTATION, et al.	)	
Defendants.	)	

☐ **Jury Verdict:** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court:** This action came to trial before the Court with the judge named above presiding. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
(Filed August 11, 1983)

pursuant to the Decision and Order filed and ENTERED this date that JUDGMENT is hereby ENTERED in favor of Plaintiff and against all Defendants: State of IL, Dept. of Transportation, John D. Kramer, J. E. Harland and Allen Austin. FURTHER ORDERED that a mandatory injunction will

issue directing the defendants, and each of them, as agents of the State of Illinois, to take all action which may be necessary to vacate IDOT's claim under the dedication to all that part of Lot J as shown by Plaintiff's exhibit 12 and legally described in Plaintiff's exhibit 9, to restore to plaintiff all possessory rights as the fee simple owner thereof, and to quiet title in Plaintiff thereto.

Date:

August 11, 1983

Clerk:

/s/ Robert J. Kauffman
Robert J. Kauffman

(By) Deputy Clerk:

/s/ Holly Loudenburg
Holly Loudenburg

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ILLINOIS
TAZEWELL COUNTY

TOLEDO, PEORIA & WESTERN RAILROAD COMPANY, a corporation,	)	
Plaintiffs	)	AT EQUITY 81-CH-302
vs.	)	
DEPARTMENT OF TRANSPORTATION, State of Illinois	)	
Defendants	)	

ORDER OF DISMISSAL
(Filed April 16, 1981)

This cause having come to be heard on Defendant's Motion to Dismiss herein duly filed on March 3, 1981, both parties hereto represented by their respective attorneys in open court, the court having heard the arguments of counsel and being fully advised in the premises.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the above entitled cause be and the same hereby is dismissed with prejudice, costs to the Plaintiff.

ENTERED: April 16, 1981

/s/ John A. Gorman
John A. Gorman, Circuit Judge

Opinion by Judge Wood
JUDGMENT - ORAL ARGUMENT
UNITED STATES COURT OF APPEALS 17

For the Seventh Circuit
Chicago, Illinois 60604

September 26, 1984

Before

Hon. William J. Bauer,
Circuit Judge

Hon. Harlington Wood, Jr.,
Circuit Judge

Hon. Stanley A. Weigel,
Senior District Judge*

TOLEDO, PEORIA & WESTERN RAILROAD COMPANY, a Corporation, Plaintiff-Appellee, Cross-Appellant,	)	Appeals from the United States District Court for the Central District of Illinois, Peoria Division
Nos. 83-2638 & 83-2709 vs. STATE OF ILLINOIS DEPARTMENT OF TRANSPORTATION; JOHN D. KRAMER, J. E. HARLAND and ALLEN AUSTIN, Defendants-Appellants, Cross-Appellees.	)	No. 81-C-1067 Robert D. Morgan, Judge

This cause was heard on the record from the United States District Court for

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* The Honorable Stanley A. Weigel, Senior District Judge for the Northern District of California, sitting by designation.

the Central District of Illinois, Peoria Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and the case is REMANDED, with instructions, in accordance with the opinion of this Court filed this date.

Office-Supreme Court, U.S.
FILED
FEB 25 1985
ALEXANDER L. STEVAS,
CLERK

(2)

NO. 84-990

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

TOLEDO, PEORIA & WESTERN RAILROAD COMPANY
a Corporation, PETITIONER

v.

STATE OF ILLINOIS, DEPARTMENT OF TRANSPORTATION; JOHN D. KRAMER; J. E. HARLAND; and ALLEN AUSTIN, RESPONDENTS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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January 1985

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SUMMARY OF ARGUMENT

The decision of the Seventh Circuit in this case is in accordance with recent decisions of this court on the issue of sovereign immunity of the states. Such immunity was not abrogated by Congress with enactment of the Civil Rights Act of 1871.

This case is an action against the State of Illinois, not against the named individuals, since the issue is the state's own interest in real property. Therefore, the legal fiction which permits civil rights suits against officials as distinct from the state is not applicable.

With respect to Petitioner's Fourteenth Amendment claim, issues of state law are controlling. The Petitioner assumes the state can abandon its interest in real property, and that the Illinois Court of Claims cannot provide a remedy. These are untrue, or, at best questionable, assumptions which should

not be used as a basis for action by this court.

I. THE DECISION OF THE SEVENTH CIRCUIT IS IN ACCORDANCE WITH PRONOUNCEMENTS OF THIS COURT.

The Petitioner asks this Court to decide, once again, whether the Civil Rights Act, 42 U.S.C. sec. 1983, abrogates the constitutional immunity enjoyed by the State of Illinois pursuant to the Eleventh Amendment to the Constitution. This Court has repeatedly held, as did the Seventh Circuit, that it does not. **Quern v. Jordan**, 440 U.S. 332 (1979); **Alabama v. Pugh**, 438 U.S. 781 (1978); **Edelman v. Jordan**, 415 U.S. 651 (1974). The rule was recently restated in **Pennhurst State School and Hospital v. Halderman**, _____U.S.____,104 S.Ct. 900 (1984).

The Petitioner suggests that the Seventh Circuit "confuses the constitutional immunity issue with the statutory "person" issue and treats the two questions as one." (Petition p. 28). Petitioner ignores the fact that, as

set forth in this Court's analysis in the **Edelman** and **Quern** cases, the two questions are one. The State and its agencies are entitled to constitutional immunity unless that immunity is waived either by an act of the State or an act of Congress. Because Congress in enacting sec. 1983 did not override the traditional sovereign immunity of the states, the states are not statutory persons.

There can be little question that this is a suit against the State of Illinois. While three state officers are nominally defendants, along with the Illinois Department of Transportation, it is clear that the relief sought is against the State, not against the officers.

In 1956 the State of Illinois acquired from Plaintiff a possessory interest in certain real estate, paying the full appraised value of the fee interest. The Plaintiff in this suit seeks a ruling that the State has, by its action or inaction, forfeited its right to

that possessory interest. The whole purpose of the suit is to determine what, if any, right the State retains with respect to the property. This is not a case subject to the doctrine of **Ex parte Young**, 209 U.S. 123 (1908). The individual state officers have no interest in the property, nor can they transfer any interest held by the State absent specific statutory authority to do so. In fact, it is questionable whether, in their official capacity, they have any authority to quiet title in the Plaintiff as originally directed by the district court. (See section II B, infra). The trial court recognized this fact in its order of June 1, 1983. (Petition, p. A-45-46).

The Petitioner suggests the principles of sovereign immunity do not prevent a federal Court's initial inquiry concerning the validity of the Plaintiff's claim to title. This is an argument initially rejected by this court in **Larson v. Domestic and Foreign**

Commerce Corp., 337 U.S. 682 (1949). As stated by the Court in **Larson**, such an argument confuses the doctrine of sovereign immunity with the requirement that a plaintiff state a cause of action. 337 U.S. at 692. The court has recently had occasion to reexamine the principle in **Florida Department of State v. Treasure Salvors, Inc.**, 458 U.S.670, 102 S.Ct. 3304 (1982). Therein, both Justice Stevens' plurality opinion and Justice White's separate opinion rejected a court of appeals holding which was in accordance with the argument made by Petitioner in this case. As observed by Justice White, it is equivalent to asserting that suits against a state are permitted by the Eleventh Amendment if the result is that the state loses. 458 U.S. at 703.

In **Florida Department of State** it was observed that the state had no colorable claim to the property in question. The same cannot be said in the case at bar, as the only

documentary evidence shows the State of Illinois has a permanent easement for highway purposes with respect to the land in question. Petitioner seeks to have that easement extinguished and would have the federal court find jurisdiction on the basis that the easement has been abandoned, notwithstanding the State's repeated and vigorous denials of the abandonment.

II. THE ISSUE OF WHETHER THE EXISTENCE OF A STATE COURT OF CLAIMS DEFEATS FEDERAL JURISDICTION OVER FIFTH AND FOURTEENTH AMENDMENT PROPERTY CLAIMS IS NOT RIPE FOR DECISION IN THIS CASE

Apparently as an alternative to its sec. 1983 claim, the Petitioner asserts federal jurisdiction on the basis of the Fourteenth Amendment. The Petitioner acknowledges that, as set out in this court's opinions in **Parratt v. Taylor**, 451 U.S. 527 (1981) and in **Larson**

v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949), the existence of an adequate state Court of Claims remedy defeats federal jurisdiction in a Fourteenth Amendment property claim case. The petitioner reasons, however, that where a Court of Claims remedy is inadequate federal jurisdiction should attach to vindicate plaintiff's Fourteenth Amendment right.

The difficulty with Plaintiff's argument is that it assumes, first, that Illinois law permits a state agency to abandon an interest in land, and second, that the state Court of Claims remedy is inadequate. Both are issues of state law on which there is no authority to support Plaintiff's position, and which the lower courts in this case have failed to consider.

A. THE ILLINOIS COURT OF CLAIMS AFFORDS PLAINTIFF DUE PROCESS

Other than the bare allegations of the Plaintiff's Complaint that it could not attain a complete remedy in the Illinois Court of Claims pursuant to the Court of Claims Act, Ill.Rev.Stat. Ch. 37, sec. 439.1 et seq. (1981), there has been no showing whatsoever on the part of the Plaintiff that it has been denied due process. There was no finding by the district court of a denial of due process. The trial court did mention in its September 4, 1981 order, with reference to Defendants' contention that a remedy may be had in the Court of Claims, that "it is far from certain that that is a valid position." However, the trial court found that it did not need to determine whether the Court of Claims accorded due process, as the existence of a state remedy did not bar the federal action. (Petition p. A-20). The lower court

considered no evidence and made no ruling on whether the Illinois Court of Claims Act, and the procedures therein, would provide Plaintiff with due process in accordance with the State and United States Constitutions.

The Court of Claims Act has previously been held to be constitutional. **Seifert v. Standard Paving Company**, 64 Ill.2d 109, 355 N.E.2d 537 (1976). In addition, as a matter of law it is clear that several of the conclusions in Plaintiff's complaint with respect to the jurisdiction of that court, and the availability of a remedy to Plaintiff there, are incorrect. In fact, it appears, after a thorough review of the Court of Claims jurisdiction, that the remedies available in that forum are greater than those which have been accorded to the Plaintiff in the federal court.

The Plaintiff contends in his Complaint that "the maximum amount that can be awarded to any claimant is $100,000 regardless of the

loss sustained and the Court of Claims lacks equity jurisdiction." (Complaint, p. 4). While it is true that the Court of Claims lacks general equity jurisdiction, it can and does grant equitable relief in certain instances. For example, in **Hicks v. State**, 32 Ill.Ct.Cl. 529 (1978), the court exercised such equitable power to reform a deed, after discussing its jurisdiction to do so. Further, the Court of Claims can entertain a Declaratory Judgment action. **Orr Construction Company v. State**, 30 Ill.Ct.Cl. 266 (1975). Court of Claims use of such equitable remedies has been approved by the Circuit courts of the state. **G. H. Sternberg Company v. Bond**, 30 Ill.App.3d 874, 333 N.E.2d 261 (5th Dist. 1975)); **Liebman v. Board of Governors of State Colleges and Universities**, 79 Ill.App.3d 89, 398 N.E.2d 305, 34 Ill.Dec. 63 (1st Dist. 1979). A similar action could have adjudicated the rights of the parties in the present case, just as the federal court has

done. The Court of Claims, in addition to adjudicating the rights of the parties to the property in dispute, could have granted the Plaintiff a money judgment for invasion of its property rights. The federal court could not.

The Plaintiff contends that awards in the Court of Claims are limited to $100,000. But, while it is true that tort claims in the Court of Claims limit a claimant to $100,000 in recovery, the limit on tort awards would not necessarily apply to the Plaintiff's claim for the alleged taking of its property. Further, there is apparently no limit on the court's jurisdiction to order the return of specific property, within its jurisdiction to hear "all claims against the State founded upon any law of the State of Illinois...". Ill.Rev. Stat. Ch. 37, Sec. 439.8(a). The Illinois Constitution provides that property shall not be taken without due process. Const. Art. 1 sec. 2. (1970). This is surely a law of the

State pursuant to which the Court of Claims should have jurisdiction.

The Plaintiff also claims the Court of Claims Act is unconstitutional by reason of the fact that it does not accord to Plaintiff all the procedures which would be available to it in federal court. Again, there is no evidence in the record as to the procedures of the Court of Claims. However, it is elementary that a litigant need not be accorded the full protection of the Federal Rules of Civil Procedure in order to be accorded due process of law. **Parratt v. Taylor**, 451 U.S. 527 (1981). The Plaintiff in this case has not shown that it has been denied the opportunity to make a claim against the State, provide evidence on its own behalf, and have its claim decided fairly and impartially by an unbiased decisionmaker. The lower court in this case effectively refused to hear any such argument, and simply discounted the numerous State authorities

which have upheld the Court of Claims Act and ruled that its jurisdiction is exclusive with respect to claims such as Plaintiff's. **E.g. S. J. Groves and Sons v. State**, 93 Ill.2d 397, 444 N.E.2d 131, 67 Ill.Dec. 92, appeal dismissed, 103 S. Ct. 3103 (1983); **Gordon v. Department of Transportation**, 109 Ill.App.3d 1071, 441 N.E.2d 904, 65 Ill.Dec. 589 (1982); **Sass v. Kramer**, 72 Ill.2d 485, 381 N.E.2d 975, 21 Ill.Dec. 528 (1978).

If there is a legitimate question as to whether the Court of Claims has jurisdiction to provide Plaintiff with a remedy in this case, that is a question to be determined by the legislature and courts of the State of Illinois, not by federal courts. Plaintiff should, at least, be required to seek his remedy in the Court of Claims, and only upon a finding by that forum of its inability to provide Plaintiff with complete relief (assuming Plaintiff were to prove its claim) should the Plaintiff be allowed to claim, in

essence, that the Illinois Court of Claims Act is unconstitutional as applied to it.

B. UNDER ILLINOIS LAW, THE DEPARTMENT OF TRANSPORTATION CANNOT ABANDON AN INTEREST IN REAL PROPERTY WITHOUT COMPENSATION.

The Plaintiff's position, and the premise upon which the above arguments are made, is that common law principles of abandonment apply to the Defendant State. Defendants submit that such an assumption is unwarranted, and that common law principles of abandonment have been changed by statute with respect to a property interest held by the State or its agencies.

The authority to dispose of property of the state is vested in the General Assembly and, in the absence of statutory authorization, a department, board, or commission lacks power to dispose of any interest in such property.

Edwardsville v. County of Madison, 251 Ill. 265, N.E.238 (1911); **Harris v. Board of Supervisors**, 105 Ill. 445 (1883); 1912 Op. Atty. Gen. 1077. There are currently two statutes which deal with the vacation, sale or exchange of highway lands or properties by the State. One of them, Ill.Rev.Stat. Ch. 121, sec. 9-127, concerns the title to highways "vacated under or by virtue of any Act of this State or by the highway authority authorized to vacate" highways. The other, Ill.Rev.Stat. Ch. 121, Sec. 4-508, provides:

> "4-508.(a) Except as provided in paragraph (c) of this Section, and subject to written approval of the Governor, the Department may dispose of, by public sale, at auction or by sealed bids, any land, rights or other properties, real or personal, acquired for but no longer needed for highway purposes or remnants acquired under the provisions of Section 4-501, provided that no such sale may be made for less than the fair appraised value of such land, rights, or property.
>
> "(b) except as provided in paragraph (c) of this Section, and subject to the written approval of the Governor, the Department may echange any land, rights or property no longer needed for highway purposes, or remnants, acquired under the

> provisions of Section 4-501 of this Code for equivalent interests in land, rights or property needed for highway pruposes. Where such interests are not of equivalent value cash may be paid or received for the difference in value."

Subsection (c) of the statute concerns disposition of residential property and is not relevant to the current matter.

Section 9-127 clearly shows that highway right of way is to be vacated only by an Act of the State or in a manner authorized by the highway department. Section 4-508 clearly provides that an interest in real property may be disposed of only with approval of the governor and for cash or property of equivalent value. Neither provision allows the department to simply walk away and abandon an interest in a piece of property which has some considerable value to the State. Thus, the department, as an agency of the State, cannot, by mere non-use, abandon a property interest of value to the State without the express authorization of the General Assembly,

which has sole authority to dispose of State owned property. Defendant Kramer herein, as Director of the Department of Transportation, cannot quiet title to property in Plaintiff without approval of the governor or legislature.

The proposition that the State cannot abandon property absent authorization by the legislature is one which has not been decided by the courts of Illinois. However, it is not unprecedented. In **Poe v. Department of Transportation**, 32 Or.App. 493, 600 P.2d 939 (1979), the Oregon Appellate Court decided that, where the state legislature had provided a statutory scheme for the disposition of highway department property, the department could not abandon property without following the scheme, no matter how indefinite it may be. Similarly, in this case the Illinois legislature has provided a statutory scheme for the disposition of property no longer needed for highway purposes, so the department

cannot abandon an interest in property without following that scheme.

The principle that the State cannot abandon property absent specific authorization by the legislature is also supported by the rule that a statute of limitations does not run against the State. It was a principle of English common law, later adopted by the courts of this country, including those of the State of Illinois, that title to property by adverse possession cannot be gained as against the sovereign. **Black v. Chicago B & Q R. R. Company**, 237 Ill. 500, 86 N.E. 1065 (1909). Thus, one who possesses and uses property of the State without authorization or right for a period of twenty years cannot gain title to the property by adverse possession. Such a rule would be of little use if that same individual could, merely by claiming that the State's lack of use of the property constituted abandonment, claim title to it as abandoned property. A much more logical, and

consistent, rule would be that the State does not lose title to an interest in property by non-use or abandonment absent some affirmative official act on the part of the State showing its clear intention to give up its interest. Such a rule is particularly suitable where, as in Illinois, the legislature has provided a means of disposition of unused or unneeded property.

Once again, this is a question of state law, which should be determined by the courts of the State of Illinois, not by a federal court which must assume a decision against the interest of the state in order to uphold its own jurisdiction.

CONCLUSION

This honorable court should deny the Petition for a Writ of Certiorari in this case because the constitutional issues raised by the Petitioner are points that are well

settled by recent opinions of this court. The decision of the Seventh Circuit is in accordance with these recent decisions. Further, a proper discussion of and decision in this case would necessarily require the discussion of at least two matters which are strictly questions of state law and which should be decided by the State of Illinois and its courts. The District Court chose to ignore the issues of state law in order to maintain its own jurisdiction. The Apellate Court reversed. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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A P P E N D I X

Motion to dismiss is hereby granted and said cause dismissed.

(No. 74-CC-0847—Claim denied.)

ALLIE HICKS and ERMA E. HICKS, Claimant, *v.* STATE OF ILLINOIS, Respondent.

Opinion filed December 22, 1978.

JURISDICTION—*Equity and reformation of deeds.* The Court of Claims has limited equitable powers, including authority to enter an award reforming a deed, but such an award would still require some legislative action to carry out the award.

HOLDERMAN, J.

Claimants seek herein to reform a deed conveying certain real estate to the State of Illinois by adding an exception reserving to them the oil, gas and other minerals under said land. No request has been made for an award for damages, though they do ask that they have such other relief as the Court deems proper.

On the hearing, no evidence of any money damages was introduced and therefore the claim was narrowed to sole request that this Court reform the deed.

The evidence shows that on or about May 15, 1972, Claimants discussed the sale of their property with one Roger Hazlett, a representative of a firm having a contract with the State to acquire or purchase property for the State. Claimants testified that they told Hazlett that they would sell the surface of their 80-acre farm near Dolan Lake, but that they had leased the coal to Amax Coal Company for 20 years. Claimants testified that on or about June 5, 1972, Hazlett returned to their farm and gave them a check for $28,000.00. Hazlett brought a deed with him and Hicks and his wife signed it. Claimants state that Hazlett told them he had

excluded the minerals rights from the sale of the surface. In fact, the deed did not exclude the minerals rights.

Hazlett was called as a witness by Claimants. He testified that he was employed by David Sullivan Land Services, Inc., which had a contract with the Illinois Department of Conservation. He stated that on May 15, 1972, he offered Claimants $26,000.00 for their property, but that no agreement was made. Hazlett testified that on May 15, Mr. Hicks told him that he wanted to retain the minerals. Hazlett advised Hicks that he would see if there could be a conveyance without the minerals.

Hazlett further testified that the State would not accept a deed to the surface only, and that on June 5, 1972, he returned home and read the deed to Mr. Hicks in its entirety. Hazlett stated that in his opinion, Mr. Hicks understood that he was conveying both the surface and the mineral rights. The consideration for the purchase had been increased from the original amount of $26,000.00 to $28,000.00. Hazlett said he told Mr. Hicks that the State would not accept a conveyance of the surface only.

Two issues are before this Court. The first is whether or not this Court has jurisdiction to reform the deed as requested by Claimants. The second is whether the Claimants have proved that there was fraud in the procurement of the deed.

Claimants argue that unless this Court takes jurisdiction, they will be without remedy. They point out that they had originally brought suit in the Circuit Court of Hamilton County, Illinois, but that the case was dismissed, based on Ch. 127, Sec. 801, which provides:

"§801. *Immunity of State as defendant or party in Court.*

Except as provided in 'an Act to create the Court of Claims, to prescribe its powers and duties, and to repeal an Act herein named,' filed July 17, 1945, as amended, the State of Illinois shall not be made a defendant or party in any Court."

Section 4 of Article 13 of the Illinois Constitution of 1970 provides:

"Except as the General Assembly may provide by law, sovereign immunity in this State is abolished."

The Circuit Court of Hamilton County was correct in dismissing the Claimant's case against the State. But the question remains, has the legislature granted jurisdiction to this Court to entertain a claim to reform a deed? In arguing that the Court has jurisdiction to entertain such a claim, Claimants point out that the Illinois Constitution of 1970 provides, in part, that:

"every person shall find certain remedy in the laws for all injuries and wrongs he receives to his person, privacy, property or reputation."

It is generally held that the Court of Claims has limited jurisdiction and has only such powers as are conferred on it by the legislature. See, 33A *Ill. Law & Practice,* Ch. 7, §142. The State refers the Court to *Taylor v. Michigan, 360 Mich. 146, 103 N.W.2d 769,* where the Michigan Court of Claims held that it did not have jurisdiction to hear a declaratory judgment action or to reform a contract. The State also cites *Blue Water Excavating Co. v. State, 144 N.W.2d 630,* and *Montgomery v. State, 328 N.Y.S.2d 189,* where the New York Court of Claims held that it had jurisdiction to hear claims for money only, with its equitable powers limited solely to those set forth in the Act or incidental to enforcement of a claim for money judgment.

However, as Claimants point out, there is Illinois authority to the contrary. In *Struve v. State of Illinois, 14 Ill. App. 3d 1092, 303 N.E.2d 32*, suit was brought in the Circuit Court to determine whether the terms of a lease between the State and the Plaintiff were being violated. No claim was made for money damages. The defendants moved to dismiss the case on the grounds that such an action was one against the State, and was for the Court of Claims. The Court said:

> "We agree with the contention of the defendants that the plaintiff's dispute should be submitted to the Illinois Court of Claims. Section 8 of the "Court of Claims Act" [Ill. Rev.Stat. Ch. 27, Para. 439.8(b)], relates the jurisdiction of the Court of Claims and provides that the Court shall have jurisdiction to hear and determine:
>
> '(b) All claims against the State founded upon any contract entered into with the State of Illinois.'
>
> Regardless of the relief sought, the plaintiff has made a claim against the State, founded on a contract. These claims should be resolved in the Court of Claims..."

Claimants also cite *Sternberg Co. v. Langhorne Bond, Director of the Department of Transportation, 30 Ill. App. 3d 874, 333 N.E.2d 260.* There, plaintiffs sought and obtained a temporary injunction against the Department. On appeal, the Court reversed, holding that the action was a suit against the State of Illinois, which the Circuit Court was without jurisdiction to entertain. The Court said:

> "The holding does not mean the plaintiff, if wronged, is without remedy. Plaintiff may avail itself of any remedy provided in the Court of Claims. *Allen v. State, 2 Ill. Ct. Cl. 404, New Era Construction v. State, 6 Ill. Ct. Cl. 88 and Fuhrer v. State, 22 Ill. Ct. Cl. 144.* It is clear that the jurisdiction of the Court of Claims is not limited to money claims, and that one may pursue remedies in the Court of Claims other than for recovery of a sum of money. Plaintiff can also raise any fraud as a defense in any action by the State or the insurance company on the bond."

Recently, in *Hartford Accident & Indemnity Co. v. State,* this Court held that it had jurisdiction to enter a declaratory judgment, construing an insurance policy.

The history of the Court of Claims, as described in *"The Illinois Court of Claims: A Study of State Liability,"* published by the University of Illinois Press, lends further support to this view.

The Constitution of 1870 applied the principle of sovereign immunity, and only in the General Assembly could one seek relief for wrongs for which the State was responsible. In 1877, a Claims Commission was created to hear *"all unadjusted claims* of all persons against the State of Illinois . . . according to the *principles of equity* and justice . . ."

In 1903, the Claims Commission was abolished and the Court of Claims established with jurisdiction identical to that of the Claims Commission.

In 1917, the old Court of Claims was abolished and a new one established "to hear and determine *all claims and demands, legal and equitable,* liquidated and unliquidated, ex contractu and ex delictu, which the State, as a sovereign Commonwealth, should *in equity and good conscience discharge* and pay." (emphasis supplied)

In 1945, the present "Court of Claims Act" was passed. We note that the first three provisions relating to the Court's jurisdiction speaks in broad terms:

> "A. *All claims* against the State founded upon any law of the State . . .;
>
> B. *All claims* against the State founded upon any contract . . . with the State...;
>
> C. *All claims* against the State *for damages* in cases sounding in tort . . ."

We have found no Illinois authority that limits the Court's jurisdiction to cases involving monetary damages. While this is the usual redress sought, what is there says that we can recommend to the legislature the payment of damages arising out of deed procured

by fraud, but we cannot recommend that the legislature reform the deed itself. Such a conclusion is within the expressions of the foregoing Appellate Court decisions, and within the spirit for which the Court was established.

We believe that this Court does possess limited equitable powers including authority to enter an award reforming a deed. It must be remembered that such an award would still require some legislative action to carry out the award, and that in so holding, the Court does not imply that it has general equitable powers.

Having decided that we have jurisdiction to enter an award reforming the deed here in question, we must next determine whether Claimants have established the right to reformation.

We have carefully reviewed the record herein, and conclude that Claimants have failed to meet their burden of proving that they were mislead by the agent negotiating the purchase of their property.

It is therfore ordered that this claim be denied.

Ch. 15, Sec. 210.10, Ill.Rev.Stat., 1973, to request a replacement warrant may file an action in the Court of Claims for payment.

PER CURIAM.

(No. 6777—Declaration of rights awarded.)

ORR CONSTRUCTION COMPANY, Claimant, *vs.* STATE OF ILLINOIS, DEPARTMENT OF PUBLIC WORKS AND BUILDINGS, Respondent.

Opinion filed February 3, 1975.

HARRY M. BROSTOFF, Attorney for Claimant.

WILLIAM J. SCOTT, Attorney General; SAUL R. WEXLER and MARTIN A. SOLL, Assistant Attorneys General, for Respondent.

CONTRACTS—*ambiguity.* In construing construction contract, "may" does not mean "shall" and it is not so construed.

SAME—*same.* If contract is subject to more than one reasonable interpretation, the doubt must be resolved against the party who prepared the contract and chose the language.

SAME—*same.* Clear and unambiguous language of written contract must override custom and usage of one of the parties.

SAME—*damages.* Where state improperly required contractor to use material not required by contract, contractor was entitled to damages sustained.

HOLDERMAN, J.

This claim is founded upon a contract entered into by the respondent with the claimant, a general contractor, for the construction of a particular section of Illinois Route 57 Highway in Fayette County.[1]

The facts are not in dispute. The issues, under which claimant's five-count complaint seeks damages in the

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[1]The contract is described by the Department of Public Works and Buildings as FAI Route No. 57, Project 1-57-3 (73) 134, Section 26 (1A, 1B-1, 2A, 2B-1 Fayette County. Job No. 97-133-68.

sum of $572,408.12, arise out of a dispute in the interpretation of "Special Provisions" in the contract entitled, "Removal and Replacement of Silty Topsoil Materials".

This court is called upon to resolve the legal issues by making a judicial interpretation of the contract provision in dispute. Hence, without any objections from the respondent, we granted claimant's motion to render a declaratory judgment in this cause pursuant to *§57.1 of the Civil Practice Act.* The parties concede that a declaration of their respective rights under the disputed provision of the contract which they request this court to construe may obviate the necessity for further litigation on the question of damages.

Both parties have informed the court that, if the legal question is decided in favor of the claimant, there is a possibility that the parties hereto in conference may reach a settlement on the amount of claimant's damages making it unnecessary to go to trial on that factual issue. Conversely, if the ruling is favorable to the respondent, there would be no need for further proceedings in this cause.

As essential prologue to our interpretation of the disputed section of the contract, we restate the undisputed pertinent facts. On January 24, 1969, the claimant submitted its sealed proposal for contract with the respondent under which claimant would construct the following: certain mainline grading and drainage for future pavement and ramps, as well as frontage roads, drainage structures, fencing, seeding, clearing and other work; a triple barrel box culvert; and two steel bridges. This contract, as bid upon, was prepared and drafted solely by respondent. It consists of: (a) *Plans*, (b) *Standard Speci-*

fications for Road and Bridge Construction and (c) *Special Provisions* (which supplement the *Standard Specifications.*)

The *Special Provisions* (on page 3 of the contract) provide, in relevant part:

REMOVAL AND REPLACEMENT OF SILTY TOPSOIL MATERIAL: Within the following station limits, and, as shown on the cross sections, the silty topsoil horizon is to be removed and replaced with suitable material.

This silty material shall be removed to a depth sufficient to provide a minimum thickness of 24 inches of suitable material between the bottom of the subbase and the remaining soil. The minimum depth of excavation shall be six (6) inches. The width of excavation shall extend beneath the pavement and the stabilized portions of the shoulders. The excavated material *may* be used in embankments greater than two feet in height and placed in alternate layers with suitable material. The height of embankment is to be measured from original ground to bottom of subbase. (Emphasis supplied to the keyword "may".)

The silty material as well as material excavated from ditches or other excavations which has an A-4 classification (HRB classifications) and a silt content greater than 50% shall not be placed in embankments less than two (2) feet in height.

It is hereby understood and agreed that the final determination as to the materials to be removed and replaced will be made by the Engineer in the field and the plan quantity for Earth Excavation adjusted accordingly.

[Here the contract contains a table listing 21 areas in both the northbound and southbound pavement, from station number to station numbers, in which the silty topsoil material was to be removed and replaced.]

Standard Specifications Section 202.03 (p. 31) in relevant part provides as follows:

"Unless otherwise provided in the plans or specifications, unstable and unsuitable material shall be disposed of by the contractor at his expense, outside the limits of the right of way."

Claimant, in preparing its bid for the contract, understood the above quoted special provisions and standard specifications to mean: (1) that the silty topsoil material between the indicated stations was unsuitable material and was to be removed and replaced with suitable material; (2) that the unsuitable material was to be disposed of by the contractor at his expense; (3) that, at

the contractor's election, he could use the unsuitable material for fill in embankments greater than two feet in height, provided claimant placed it in alternate layers with suitable material; and (4) that, notwithstanding the quantity for such excavation shown on the plans, the determination of what was silty material to be removed and replaced would be made by the State's Engineer and the plan quantity for excavation would be adjusted accordingly.

Claimant, relying on this understanding of the language of (3) above, determined that it could furnish a suostantially lower bid by not using said unsuitable material in embankments over two feet high, but rather by disposing of it and providing and using suitable material in the embankments. Accordingly, claimant determined and submitted its bid on that basis; namely, on claimant's election to *dispose* of the silty topsoil material and to use, instead, suitable borrow material in the embankments.

Thereafter, the claimant, having submitted the lowest bid, was awarded the job. Accordingly, on February 24, 1969, claimant entered into the aforesaid contract with the respondent. Except for the insertions of claimant's bid prices, this contract is exactly the same as that drafted by respondent for submission to all contractors for bidding.

Claimant commenced work on the job. During the course of the work, respondent's field engineer ordered claimant to use said excavated silty material in embankments of two feet or higher, contending that the election to use said materials rested with respondent. Claimant protested this interpretation of the *Special Provisions*; informed the respondent that the election to use said excavation in the embankments rested with the

claimant; that his proposal had not been based on such re-use; and apprised respondent that its order would necessitate substantial additional expense not provided for in its bid. Respondent, nevertheless, ordered claimant to use this material. Claimant complied under protest.

The issue thus presented to the court is, whether the election to use the silty topsoil (unsuitable material) rests with the claimant contractor or with the State's Engineer. The correct answer depends upon whether the grant of discretion by the word "may" in the following sentence from the "Special Provisions" supra, is addressed to the contractor to respondent's field engineer:

"The excavated material *may* be used in embankments greater than two feet in height and placed in alternate layers with suitable material."

The court takes notice that all of the other four sentences in the same paragraph from which the above sentence is lifted, are obviously all addressed to the contractor, and speak directly to *him*. They instruct *him* as to what *he shall* or *may* do, viz.

[1] The silty material *shall* be removed to a depth .....
[2] The minimum depth of excavation *shall* be 6 inches.
[3] The width of excavation *shall* extend beneath the pavement .....
[4] The excavated material *may* be used in embankments .....
[5] The height of embankments *is* to be measured from .....

Respondent admits that the sentences we have numbered 1, 2, 3 and 5 from the paragraph in question speak to the contractor.

Respondent contends, however, that *only one of the sentences* in the paragraph [the sentence we numbered 4] speaks to the engineer, and grants him discretion whether to use the excavated material in embankments over two feet. The language of this paragraph plainly gives no support to respondent's contention.

Nor does the language elsewhere in the contract. We

find that, where the contract *does* give an election or judgment to respondent's engineer, there is an explicit reference to him. For example, at page 4 of the contract, under "Filling Existing Wells":

. . .

5. . . . The material of this portion of the fill, its manner of placement and compaction is *subject to the approval of the engineer* . . .

. . .

8. The balance of the hole is to be filled with sand, embankment material, or other soil *approved by the engineer*; it shall be placed in lifts and compacted *as directed by the engineer.* (Emphasis added.)

Again, following page 18 of the contract, at Special Provisions — "Steady Burning Barricade Lights":

. . . The contractor shall replace all batteries on a group basis at 45 days or such other intervals *as may be specified by the engineer.* (Emphasis added.)

Unlike any of the foregoing provisions, the sentence in dispute ["The excavated material may be used in embankments greater than two feet . . ."] contains no such explicit reference to the engineer. It logically follows that no such reference was intended.

The disputed language, it seems to use, is plain and unambiguous. It tells the contractor *he* has the choice; that he "may" use the excavated material. Plainly, it does not tell him he "may" use the excavated material *if the State so decides*, an interpretation which would still place the election with the contractor. Equally plain, the language contains no explicit directions or reference to the engineer. We must disagree with respondent's contention that none is needed. If the intention had been, as respondent contends, it would have said: the contractor *shall* use the excavated material if the engineer so decides.

"May" does not mean "shall" and it is not so construed in private contracts. *Northwestern Traveling Men's Association* v. *Crawford, 126, Ill. App. 468, 480 (1906) aff'd. 226 Ill. 57.*

In support of its position, respondent points to ¶4 in the quoted section of the Special Provisions, which reads:

> "It is hereby understood and agreed that the final determination as to the materials to be removed and replaced will be made by the Engineer in the field and *the plan quantity for earth excavation adjusted accordingly.*" (Emphasis added.)

This paragraph relates to the first paragraph and merely places the final determination of what is to be removed with respondent's engineer. It is apparent, that this authority was given to the engineer to prevent the contractor from performing excessive excavation, with a resulting excessive cost to the State, inasmuch as the compensation to the contractor for excavation was on a cubic yard basis. Our interpretation as to the intent and purpose of the above ¶4 is further supported by the closing clause of that paragraph: " . . . *and the plan quantity for earth excavation adjusted accordingly.*" If there were any question as to the interpretation of this paragraph, the closing clause eliminates it. The closing clause makes it clear that the authority of the engineer in this paragraph is solely to determine and control, for the protection of the State, the quantity of unsuitable material to be excavated, and it informs the contractor that payment would be made on the basis of the actual quantity excavated, as determined by the engineer, and not based on the plan quantity of excavation (the quantity shown on the plans). To give this paragraph any other interpretation, we believe, would emasculate and give no meaning to the words, "*and the plan quantity for earth excavation adjusted accordingly*".

We do not see any inconsistency, as respondent suggests, in the language of the two paragraphs in question. The first one says that the contractor *may* use excavated material. The other says that the field engineer shall make the final determination as the *quantity* of materials to be removed and replaced.

Even if we could in good conscience find that there is more than one reasonable interpretation of the language in question, the doubt must be resolved against the respondent, since the respondent prepared the contract and chose the language. This venerable rule of contract construction, firmly established in Illinois, is restated in *I.L.P. Contracts §221* as follows:

> "Words which are ambiguous or of doubtful construction are to be construed most strongly against the party who prepared the contract, for the reason that he chose the language and is responsible for the ambiguities in his own expression.
>
> "This rule obtains not only in grants, but extends in principle to all other engagements and undertakings; and in construing reservations or conditions inserted in a contract for the benefit of the party who makes them, where there are clauses which are doubtful or ambiguous, that construction will be adopted which is least favorable to the party making them."

Repondent's brief does not address itself to the "resolve-doubts-against-the draftsman" rule. Rather, it suggests that the intent of the disputed language in the contract is better understood by (1) reading the contract as a whole and (2) taking judicial notice of a "custom and usage" of which the claimant allegedly had or should have had prior knowledge, viz., "The State has for many years followed the custom of utilizing the silty material in embankments as much as possible for economic reasons." [Departmental Report p. 4.]

Commenting on the last contention first, we believe that it would have been a simple matter for the respondent to have stated the aforesaid custom in its contract, which is so explicit on countless other matters of much less importance. If such a provision had been stated in the written contract, the claimant would not have been misled in submitting his bid, and this claim would not have arisen.

We have carefully examined the authority respondent cites in support of its claim that custom should

override the clear and unambiguous language of a written contract. We believe it would be unconscionable for this court to announce such a rule in the case before us. Such a rule would permit other bidders in the future to be deceived by what purports to be a complete written contract in plain language on which both parties may rely. Here the specific language of the contract clearly distinguishes the case at bar from the rule on which respondent relies in *Chicago Bridge & Iron Co.* v. *Reliance Insurance Co., 46 Ill. 2d 522, 264 N.E. 2d 134 (1970).*

We must reject respondent's argument that "custom and usage" should control our interpretation of this contract, a contention that is contrary to the rules stated in *I.L.P. Contracts, §211* "Custom and usage" and the authority of *Mulliner* v. *Bronson, 14 Ill. App. 355* in which the court said:

> " . . . the accustomed mode of dealing between parties in many prior transactions, can not be sustained, for such a private and special custom could not control the express words of the contract."

Turning now to respondent's argument that a different meaning of the contract may be gleaned from reading the contract as a "whole" to the end that we would hold with *U.S. Trust Co. of N.Y.* v. *Jones, 414 Ill. 265, Ill. N.E. 2d 144 (1953),* that

> "In construing a written instrument, its letter should be controlled by its spirit and purpose, bearing in mind that the terms employed are servants and not masters of an intent, and are to be interpreted so as to subserve, and not to subvert, such intent."

Respondent then states its conclusion that, "the intent of this contract is to give complete and final supervision to the State. Nowhere within the document does any contrary intent exist." In pursuing respondent's thesis, we started with the disputed provision in which we found that the word "may" clearly gives the election

to the contractor and not the State's engineer. We then examined the rest of the contract in a futile search for other language that might change our conclusion.

We have previously reported our analysis of the *Special Provisions* and concluded that ¶4 on page 3, the only part of these provisions on which respondent relies, merely places the determination of the *quantity* of that material which is to be removed and replaced, with the engineer in the field; and directs that the *plan quantity* for each excavation be adjusted accordingly. Thus, the *only* authority delegated to the engineer by said ¶4 is limited to the *quantity of silty topsoil to be removed* (and replaced). Accordingly, ¶4's expressly circumscribed grant of authority to the *engineer* bears no relevant relationship to the use or non-use of the silty material. Our conclusion inescapably follows that the word "may" in ¶2 grants to the *contractor* the sole option to use the silty topsoil in embankments over two feet, or not to use it as claimant determines.

This close textual analysis necessitates our agreeing with claimant's interpretation of the contract and is only confirmed by reading the provisions as an entirety.

Finally, we come to that part of the "whole" contract on which respondent further attempts to support its case, the *Standard Specifications*. In this regard, respondent refers to selected sections therein, some of which are skillfully paraphrased to imply what respondent no doubt wishes it had actually said. Others are irrelevant to the issue here. We find it significant that respondent fails to mention perhaps the most relevant and important provision of all, i.e., the opening sentence of the *Special Provisions* which declares:

> The following *Special Provisions* supplement the "*Standard Specifications . . .*" and in case of conflict with any part or parts of said specifications, the said *Special Provisions* shall take precedence and shall govern.

This provision not only destroys any support for respondent's contentions, but respondent has failed to show any significant conflict between the *Special Provisions* and the *Standard Specifications*. Moreover, if it be assumed *arguendo* that there is a conflict, the contract itself defines the manner of resolution. The *Special Provisions* take precedence. These we have held, as a matter of law, clearly support claimant's interpretation of the contract, and we find no material or significant ambiguities that would require us to support our conclusion on the "resolve doubts against the draftsman" rule.

This court has held in a line of cases over many years that, when the State is responsible for such matters as delays, changes of plans, lack of coordination of prime contractors, or faulty plans, an award will be made for the increased costs incurred, as a result, by claimant contractors.

In *Arcole Construction Company* v. *State of Illinois, 11 C.C.R. 423, (1941)*, the government-prepared plans and specifications, including a "typical cross-section" of underground conditions, contained a material misrepresentation which caused the contractor to be misled to his damage. The court held the contractor entitled to recover for these damages. The thrust of *Arcole* applies here. For, whether the focus be on physical condition or right to election, the State has misled the bidder equally.

In the case at bar, the contract clearly prescribed that the contractor "may use excavated material". Nothing in the contract required the claimant to use excavated material. The engineer in the field had no right to compel the contractor to use excavated material in place of suitable material. Clearly, the field engineer only had final determination as the *amount* of unsuitable material

to be removed and replaced, and not as to the re-use of the unsuitable material to be removed and replaced.

For all of the foregoing reasons, this court declares that the election to use or not to use the silty topsoil in embankments greater than two feet in height rested with the claimant, and that claimant is entitled to the damages which resulted from being ordered by the respondent, notwithstanding claimant's protests, to use said material in embankments greater than two feet in height.

This declaration of rights is the only relief sought by the parties in this opinion. If the parties cannot agree and enter into a joint stipulation as to the actual amount of claimant's damages, pursuant to this opinion, further litigation will be necessary on the questions of fact.

(No. 75-CC-575—Claimant awarded $600.00.)

GUARANTY CREDIT CORPORATION, Agents for SEVEN DRASK BROTHERS, Claimant, *vs.* STATE OF ILLINOIS, DEPARTMENT OF PUBLIC AID, Respondent.

Opinion filed February 4, 1975.

GUARANTY CREDIT CORPORATION, Claimant, pro se.

WILLIAM J. SCOTT, Attorney General; MARTIN A. SOLL, Assistant Attorney General, for Respondent.

CONTRACTS—*lapsed appropriation.* When the appropriation from which a claim should have been paid has lapsed, the Court will enter an award for the amount due claimant.

PER CURIAM.